

89-209

No. _____

IN THE

Supreme Court, U.S.

FILED

AUG 3 1989

JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DON EDGAR BURRIS,

Petitioner,

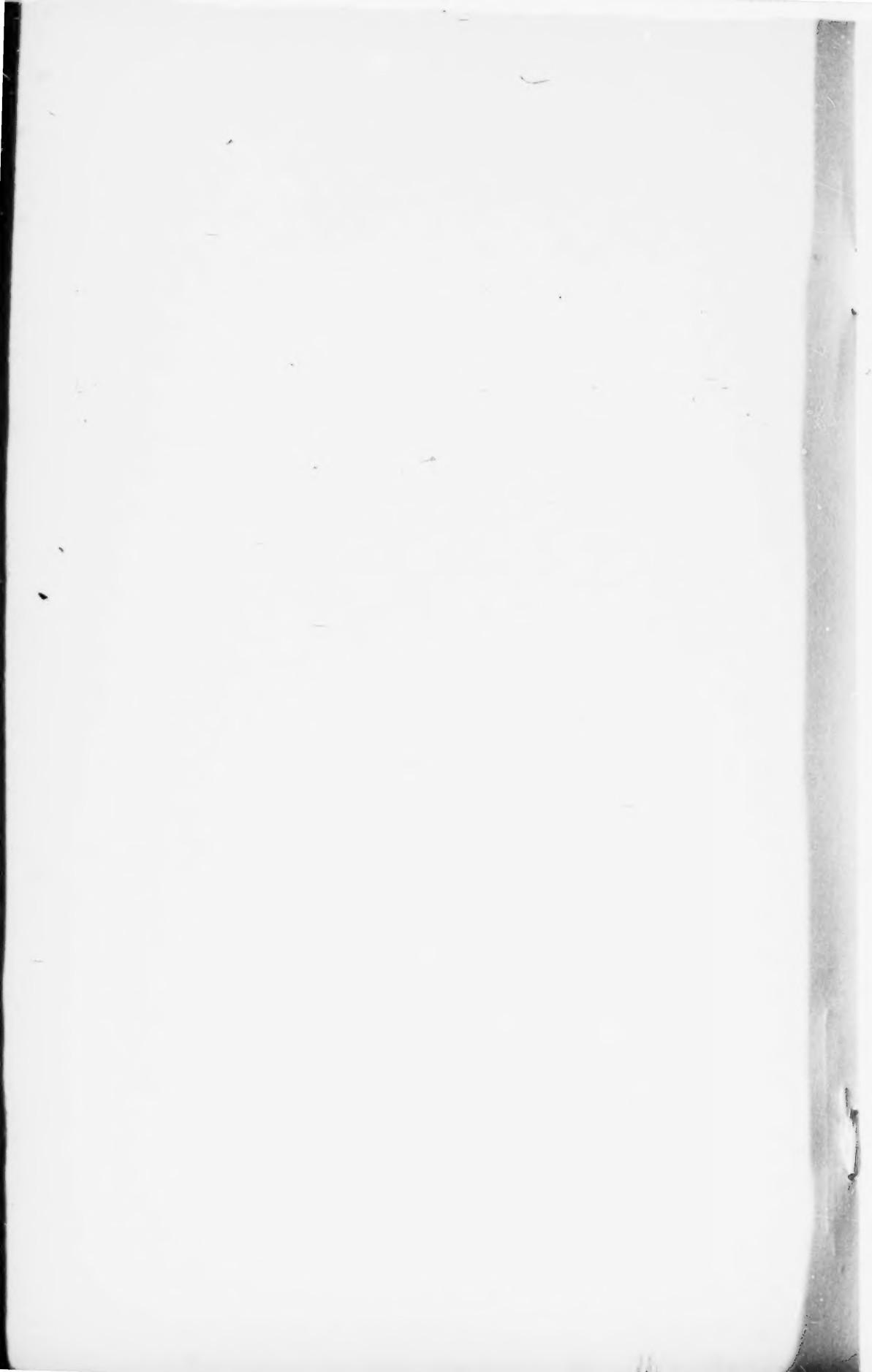
vs.

SOCIAL SECURITY ADMINISTRATION,
DEPARTMENT OF HEALTH AND HUMAN
SERVICES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

In an action before the Merit Systems Protection Board (MSPB) to remove an Administrative Law Judge (ALJ) from government service --

Whether the Civil Service Reform Act (CSRA) violates the doctrine of separation of powers and functions?

Whether the ALJ is entitled to both procedural and substantive due process proceedings?

Whether the ALJ is precluded from moving to disqualify the MSPB's ALJ hearing the case?

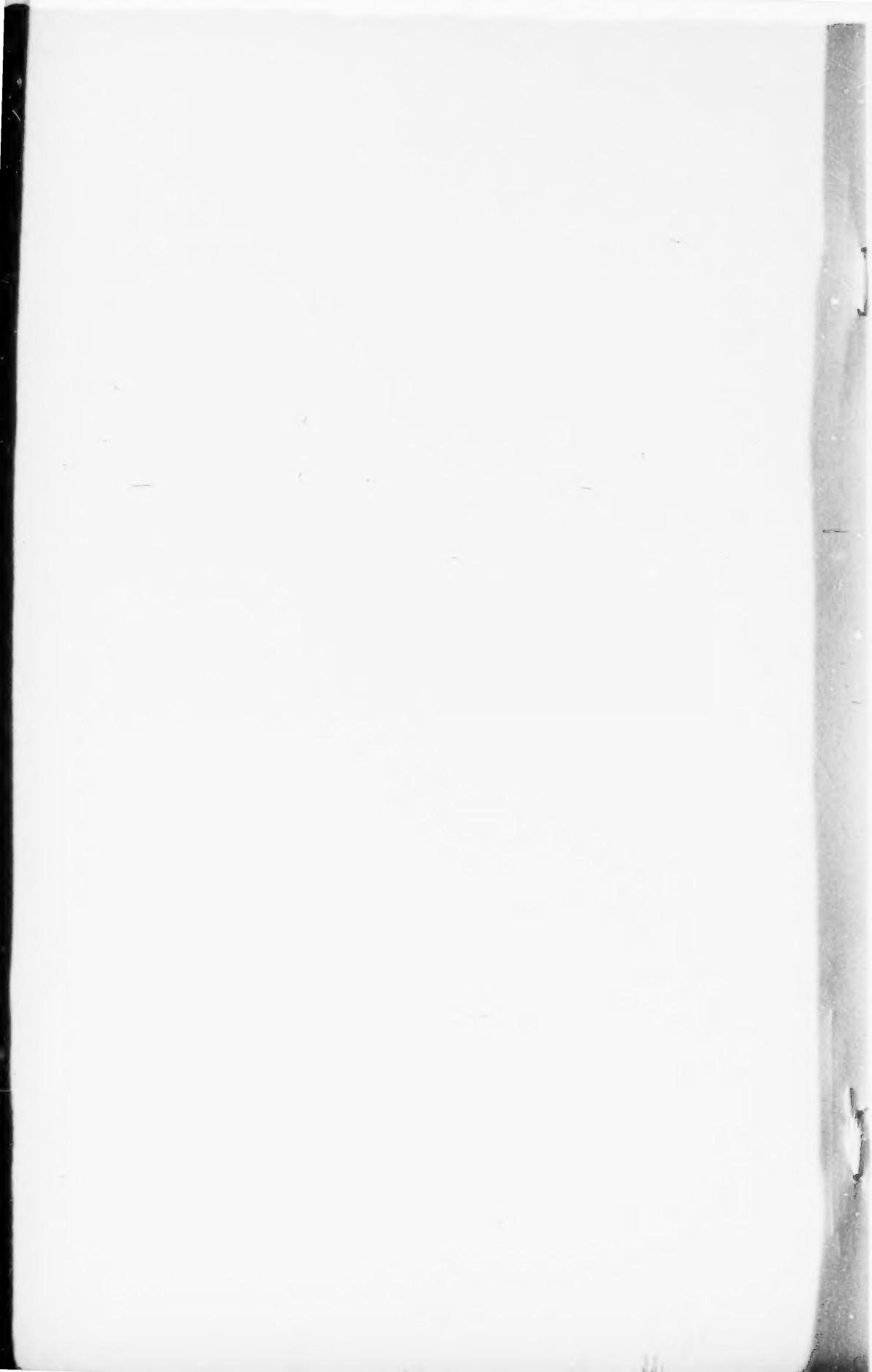
Whether, in order for the ALJ to present defenses, the complaining agency must first charge itself in the removal complaint filed against the ALJ with the conduct the ALJ wishes to present by way of defenses?



Whether the ALJ may be limited solely to the issues and time-frame of the agency's removal complaint such that he cannot show that, if he did as charged, he was following the pattern/practice established and used by the agency's management while said management and the MSPB are not limited to said issues and time-frame?

Whether the ALJ may be found guilty of defaming management personnel after being denied the right to prove that, if he said what was alleged, it was the truth?

Whether the ALJ's raising a defense of discrimination, thereby making the matter a "mixed" case, requires the MSPB to follow its own regulations and the law and hear the discrimination charges or permits it to ignore the same?



Whether the ALJ is allowed by law to present all "witnesses" and "every available defense"?

Whether the ALJ must have a "property interest" before he can complain about the agency's searches and seizures of his office, desk, credenza and files and seizures and thefts of items therefrom?



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Petitioner,

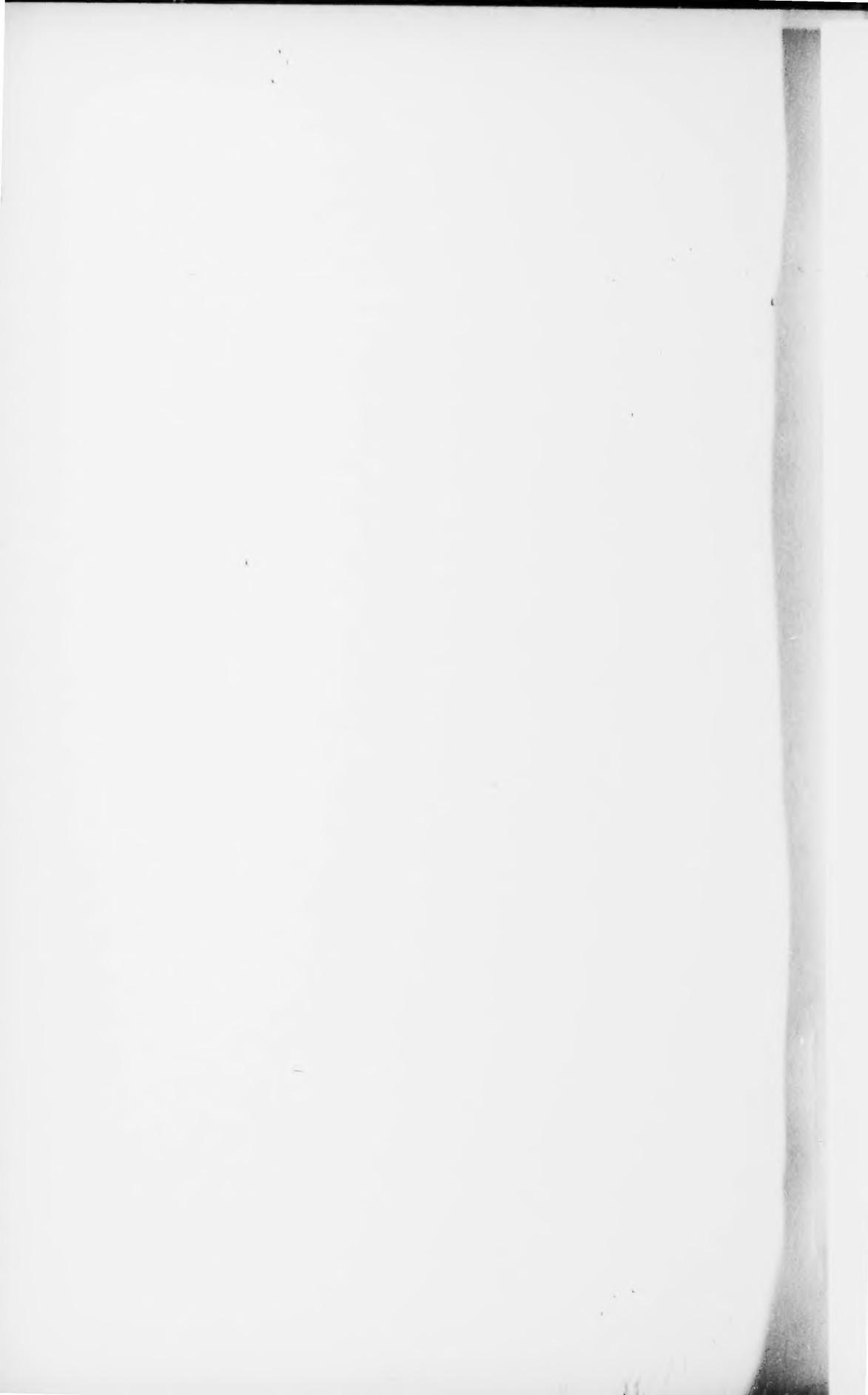
vs.

SOCIAL SECURITY ADMINISTRATION,
DEPARTMENT OF HEALTH AND HUMAN
SERVICES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Petitioner, Don Edgar Burris (hereinafter BURRIS), requests that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Federal Circuit dated May 11, 1989.



OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit was not published. (Appendix A.) The Decision of the MSPB and the Recommended Decision are contained in Appendix B and C, respectively.

JURISDICTION

The decision of the Court of Appeals for the Federal Circuit is dated May 11, 1989. Jurisdiction is invoked under 28 USCS 1254.

CONSTITUTIONAL PROVISIONS, STATUTES,
REGULATIONS INVOLVED

The constitutional provisions, statutes and regulations involved are set forth in Appendix D - F.

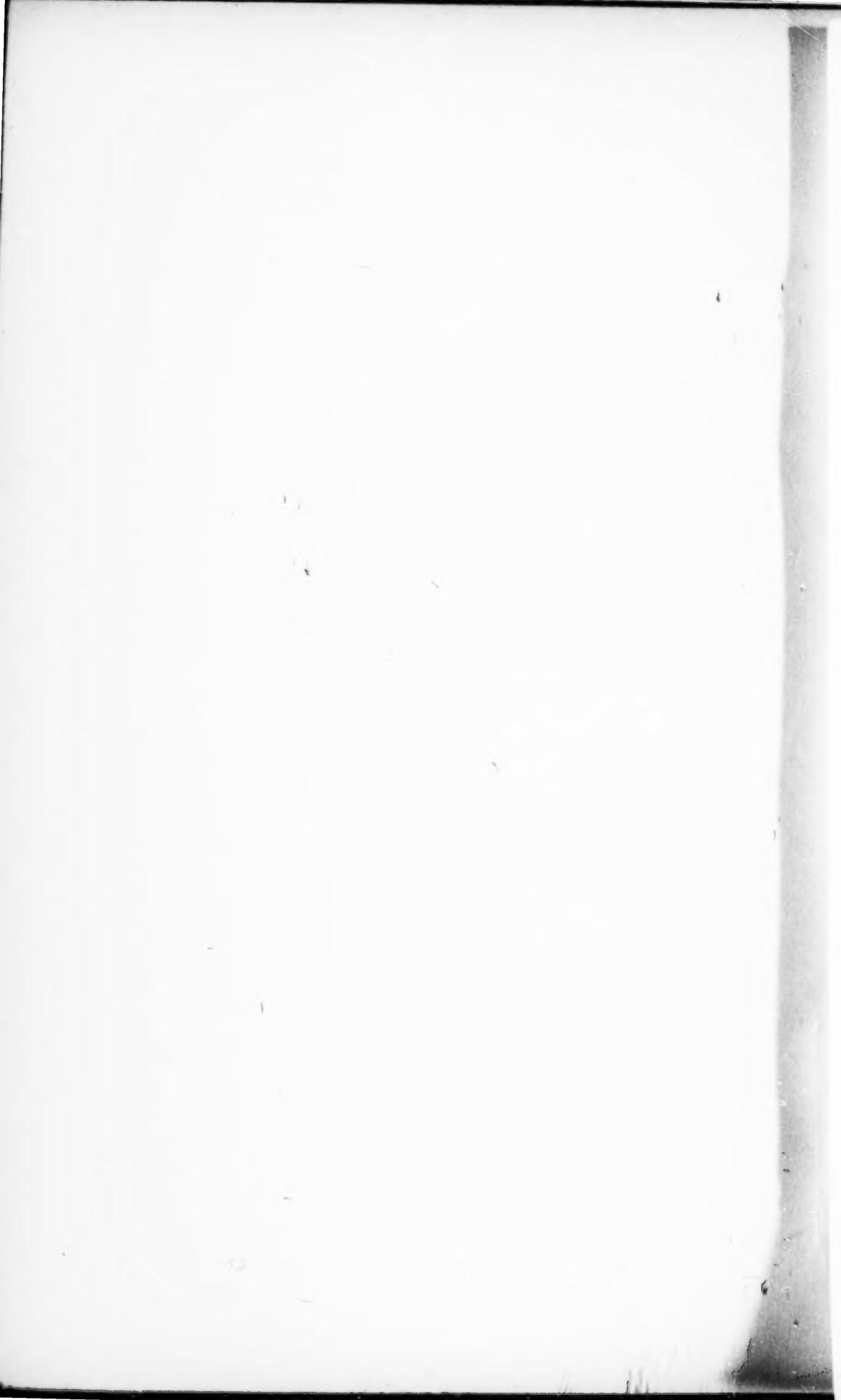
STATEMENT OF THE CASE

BURRIS, an Administrative Law Judge (ALJ) with eighteen (18) plus years of government service, worked for the Office of Hearings and Appeals (OHA), Social



Security Administration (SSA), Department of Health and Human Services (HHS) and was at all times assigned to the OHA office, Billings, Montana, Denver Region.

OHAs ALJs also serve as "management" and perform administrative duties such as Chief ALJ (CALJ), Regional Chief ALJ (RCALJ), ALJ in Charge (ALJIC) of a hearing office, etc. During most of his service, BURRIS was the only ALJ in the Billings OHA office. In 1981, ROBERT D. HIARING (HIARING) reported, at which time BURRIS was the Acting ALJIC. BURRIS selected PEGGY DAVIDSON (DAVIDSON) to be the Hearing Office Manager (HOM). HIARING coveted the ALJIC position and JANE STEADMAN (STEADMAN) the HOM's position. (STEADMAN admitted that she "resented" DAVIDSON's getting the position.) They worked with the Denver Regional Chief ALJ JAMES RUCKER (RUCKER),



the Chief ALJ, PAUL ROSENTHAL (ROSENTHAL), and others to undermine BURRIS and DAVIDSON. The result was that DAVIDSON resigned and BURRIS was relieved as ALJIC in March 1984. Shortly thereafter, HIARING became ALJIC and STEADMAN HOM.

In or about February 1984, BURRIS filed an EEO charge of sex discrimination because of certain conduct of RUCKER and others.

January 14, 1986. BURRIS filed a timely suit in U. S. District Court, Billings, Montana, after receipt of a right-to-sue letter (42 USCA 2000e-16(c)) from the Equal Employment Opportunity Commission (EEOC) pertaining to acts of retaliation/harassment (42 U.S.C. 2000e-3) against BURRIS for the filing of his initial EEO sex discrimination charge and other matters (e.g., 42 U.S.C. 1985,



1986). Defendants included HIARING, RUCKER, ROSENTHAL, SSA and HHS.

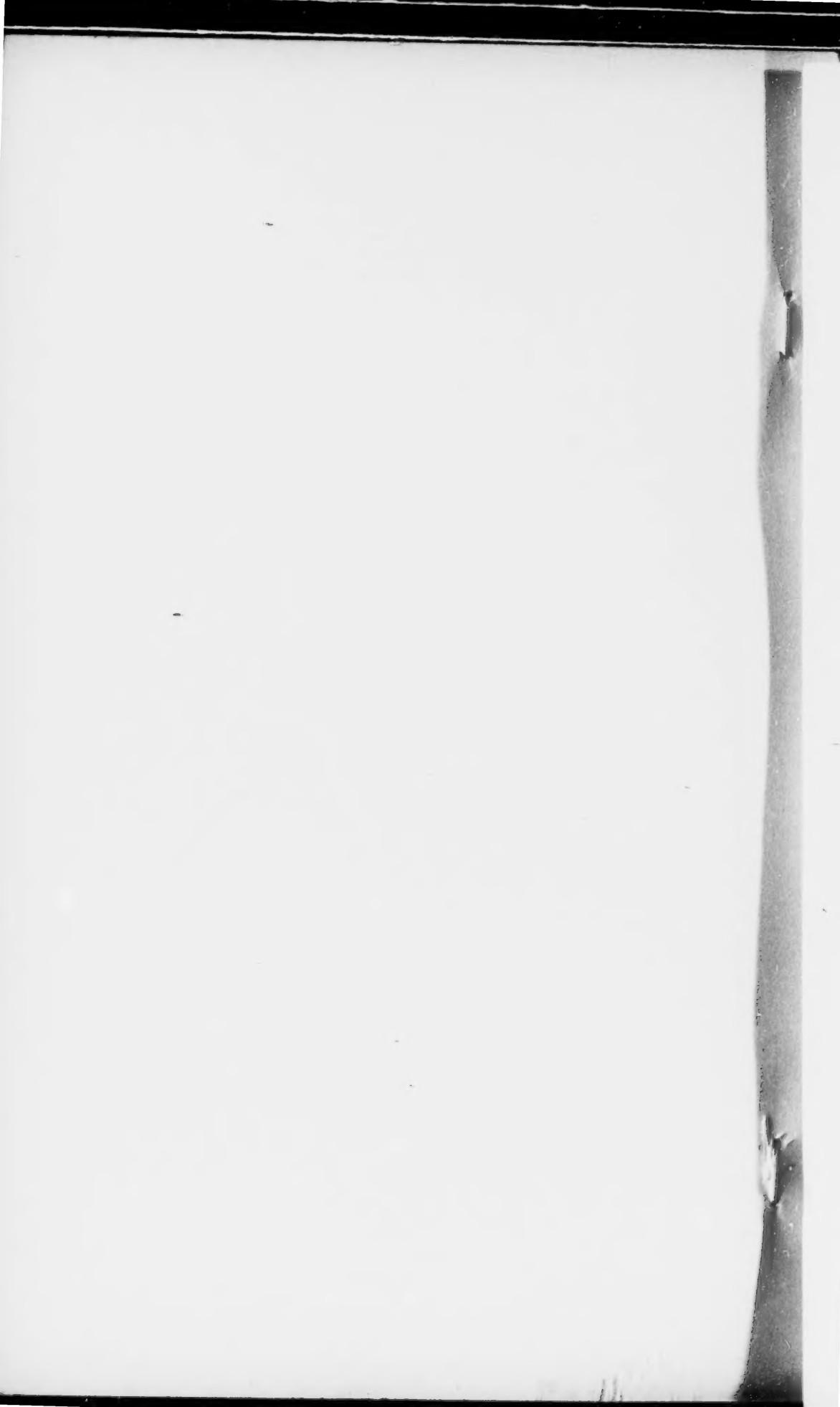
June 1986. The OHA, SSA and HHS defendants retaliated for BURRIS' filing, supra, and whistleblowing by commencing an action with the Merit Systems Protection Board (MSPB) to have BURRIS removed as an ALJ. (BURRIS timely filed an EEO complaint of retaliation for the agency's filing of said removal complaint.)

The MSPB assigned the case to its in-house ALJ, EDWARD REIDY (REIDY), set the hearing for three (3) months and twenty (20) days after BURRIS was served with the removal-complaint and publicly announced the hearing date.

The decisions terminated BURRIS from government service.

ARGUMENT

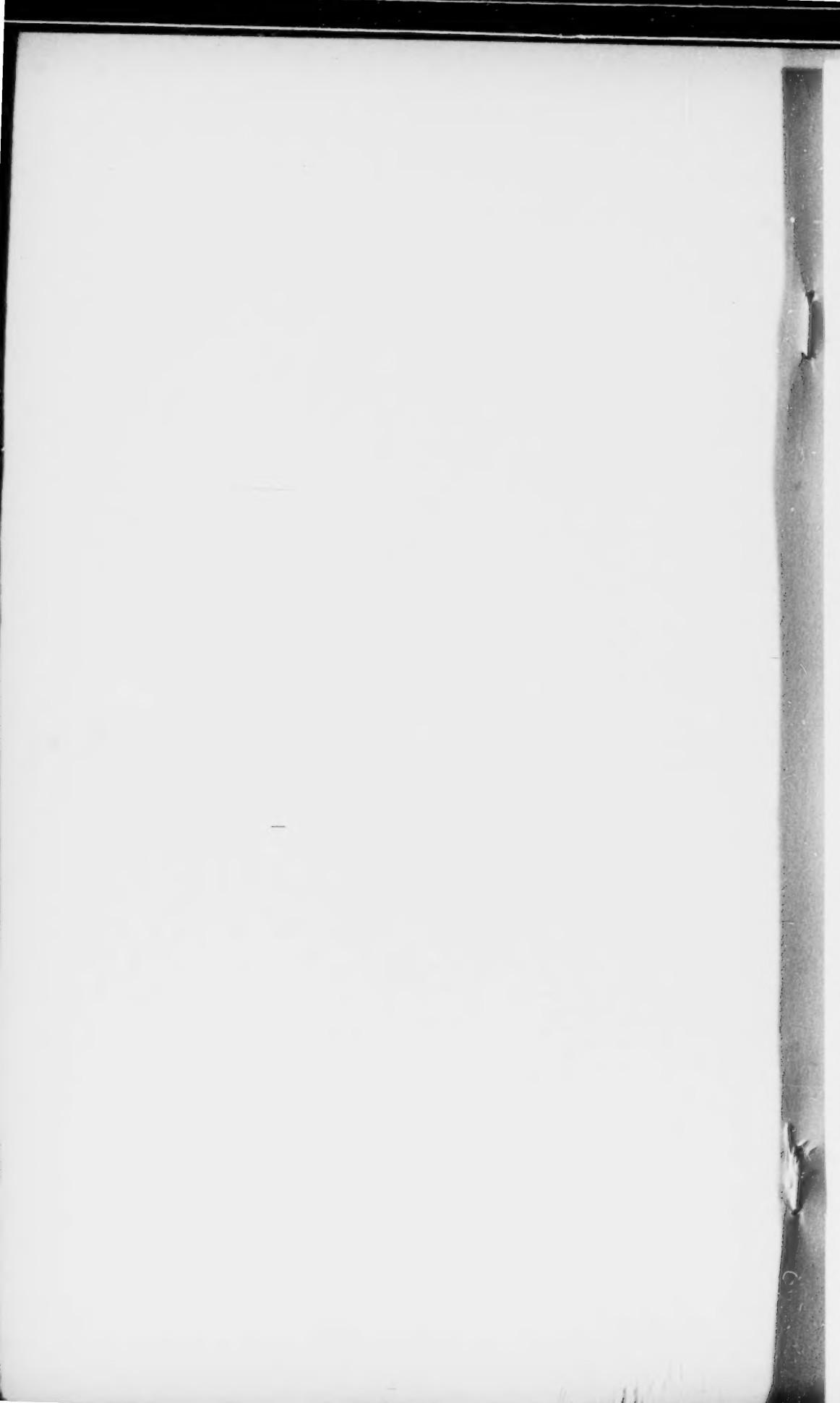
As BURRIS argued in his exceptions,



the Civil Service Reform Act (CSRA; 5 U.S.C. 7701(a)(1)) as applied at bar, is unconstitutional in that it violates the separation of powers and functions doctrine.

The members of the MSPB are appointed by the President with the consent of the Senate while the President alone designates the Chairperson. (5 U.S.C. 1201 and 1203, respectively.) The MSPB's ALJ, REIDY, functions under the Administrative Procedure Act (APA; 5 U.S.C. 3105) whereas the MSPB does not. The members are politically responsive to the demands of the executive. As this Court has heretofore found, executive branch ALJs are also responsive to such demands. (Example: Bowen v. City of New York, infra.)

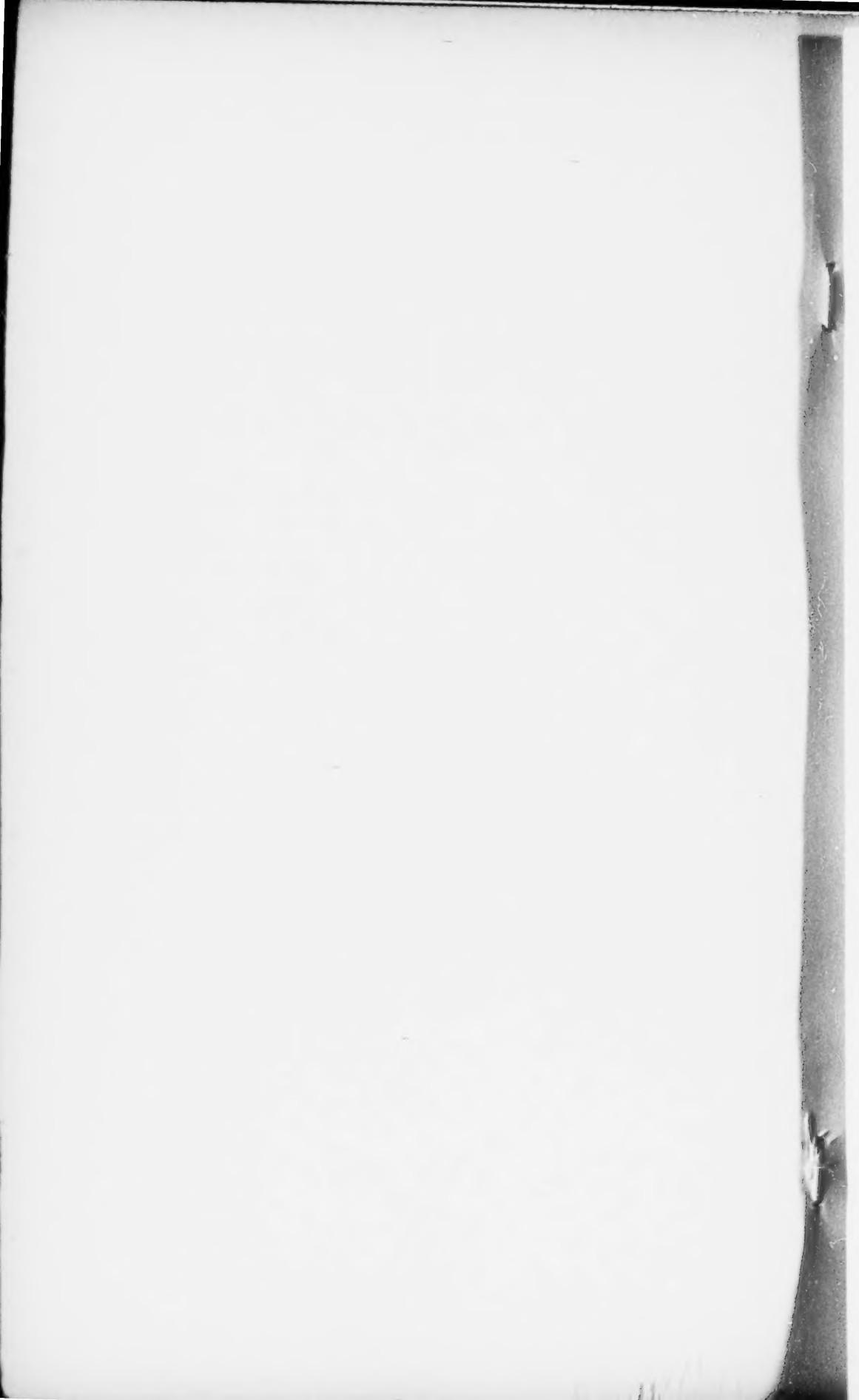
... (B)ecause the scope of judicial review is severely limited by the



language of the statute. See 5 U.S.C. Section 7703(c)(3).... the Congress "included the provision on hearings in that portion of the Act 'in order to protect the right (sic) of employees' and to guarantee a "full and fair consideration of their case." (citations) Frampton, infra, p. 1489.

By subjecting BURRIS to the arbitrariness, capriciousness, etc., of the executive branch and permitting said branch to act as lawmaker, prosecutor and judge, and by severely limiting the scope of judicial review, BURRIS has been denied due process and equal protection of the law.

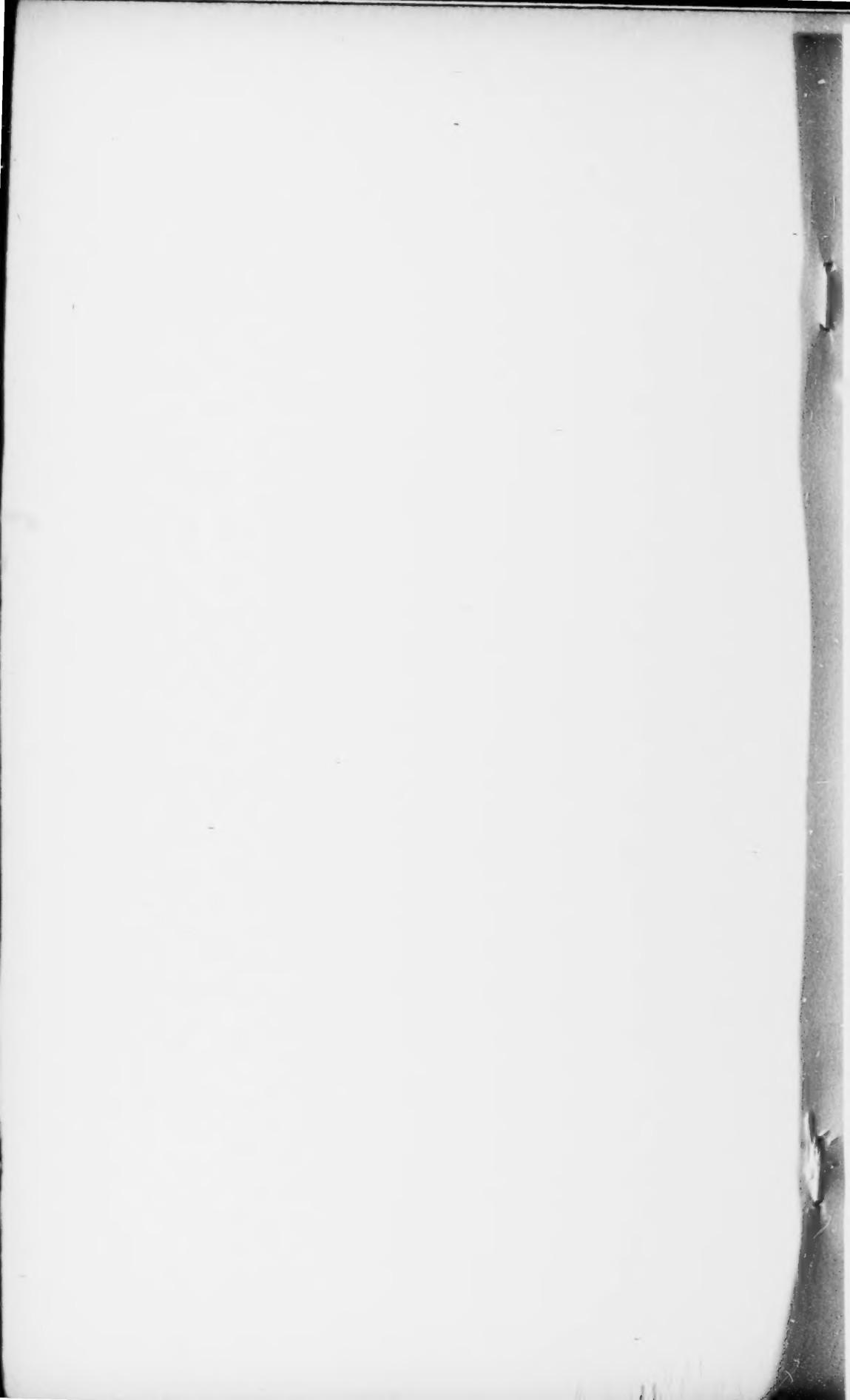
Bankruptcy courts cannot decide some questions because bankruptcy judges are not appointed pursuant to Article III of the Constitution. Northern Pipeline Construction Co. v. Marathon Pipe Line



Co. (1982), 458 U.S. 50. REIDY and the MSPB occupy a similar position since they are not appointed under Article III, but assert Article III powers.

Powers which are judicial in nature cannot be conferred upon an officer who lacks the degree of independence from the Executive that their exercise constitutionally requires. Combining the executive and judicial powers in the same person, or in the same body (e.g., MSPB), is a denial of the right to a separation of functions the goal of which was to insure fairness and impartiality ion the consideration of the rights of individuals by preventing one person from acting as lawmaker, prosecutor and judge. (See: California Lawyer, Court Perspective: "The Fourth Branch Out On A Limb," by Clyde Leland, May 1986.)

The minimum requirements of due



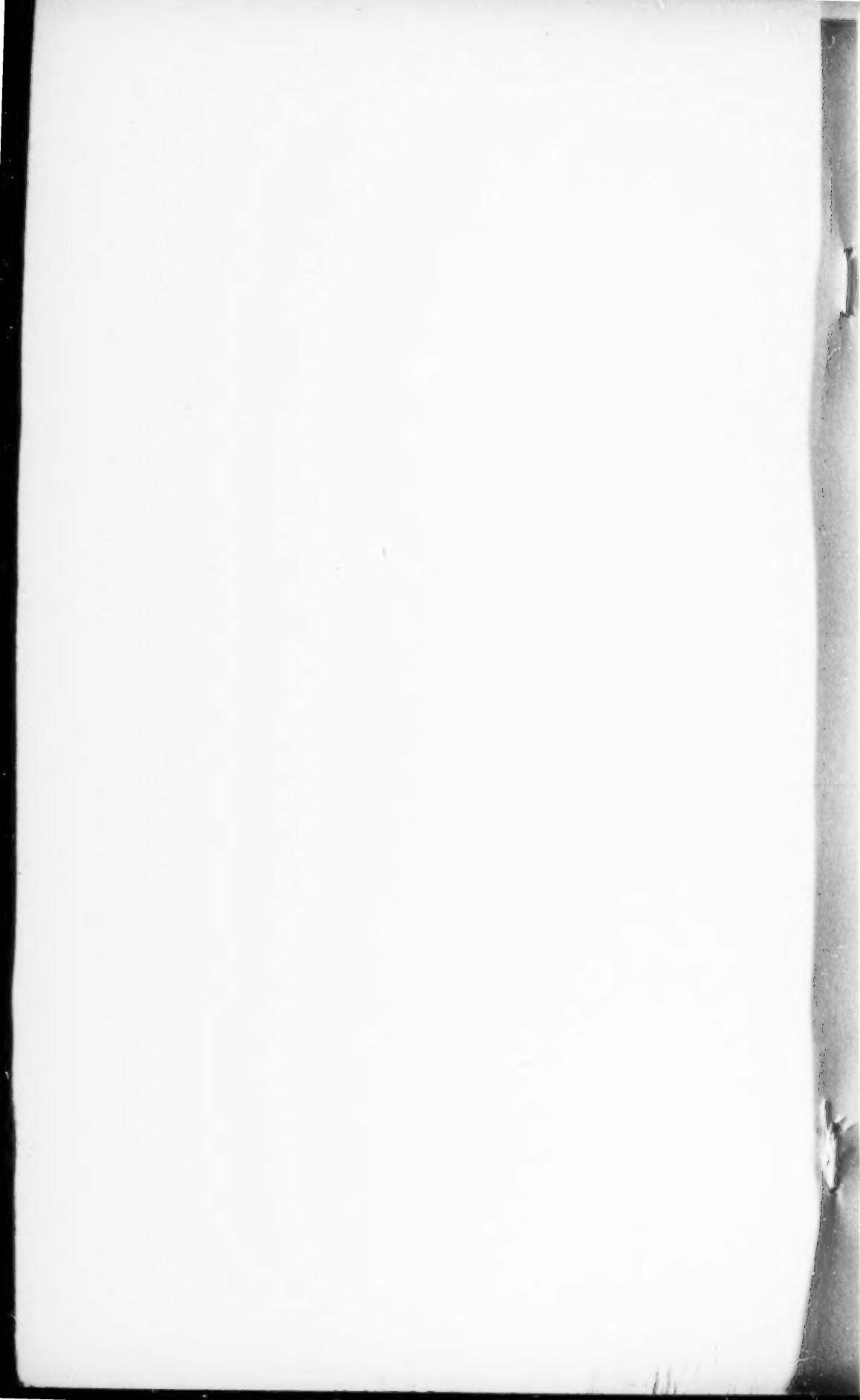
process of law (Fifth Amendment; Appendix D, p. 122) are notice and the opportunity to be heard. Anderson National Bank v. Luckett, (1984), 321 U.S. 223, 88 L.Ed. 692, 64 S.Ct. 599, 151 ALR 824.

Notice was constitutionally defective as to the time allowed and the pleadings. Under MSPB regulations, the removal complaint is not a "notice pleading". It is required to "...set forth with particularity the facts that support the proposed action." (5 C.F.R. 1201.133, Appendix F, p. 125). Instead, it recited only general allegations. BURRIS' efforts to obtain the particular facts through discovery were to no avail. Example: Immediately prior to the first day of the hearing, REIDY held the agency only had to reveal "the general factual basis for all the contentions in each count, as reduced in scope by my



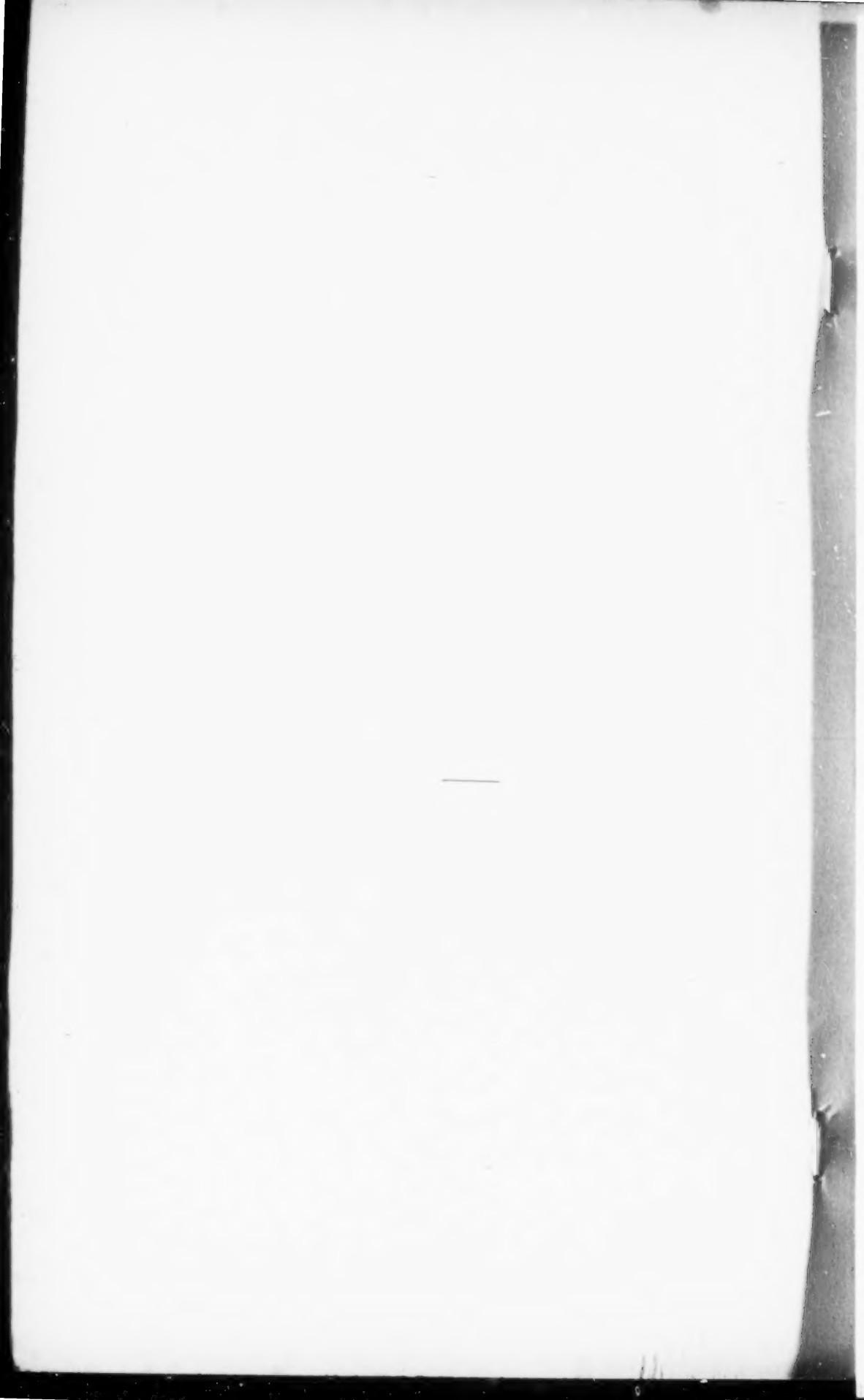
requirement that the (removal) complaint be supported only by representative samples," knowing the latter would not reach BURRIS until the hearing was actually in progress, which is exactly what happened.

The agency's response to discovery was avoidance and delay. Examples: The agency argued, and REIDY held, material was not discoverable because it would not lead to "admissible evidence." (The law does not require "admissibility". Nichols v. Philadelphia Tribune Co., 22 F.R.D. 89.) (2) In terms of documents/exhibits, this is the most voluminous case the MSPB has handled. With REIDY's approval, the agency repeatedly referred to the voluminous documents/exhibits it had filed (e.g., 4,000 pages in just one of their filings) and said BURRIS had already received



copies -- "look at my files" -- without specifying the document(s). (Martin v. Easton Pub. Co., 73 F.R.D. 439 -- the response must "state specifically and identify precisely which documents will provide the desired information.") (3) Almost every discovery matter filed by BURRIS had to be followed with a motion to compel. (4) REIDY failed and refused to rule on motions to compel, refused to impose sanctions, etc. (5) REIDY did everything to assist management with its discovery, e.g., at one point he shortened BURRIS' time for responding.

During part of the prehearing period, BURRIS was hearing and deciding cases, writing decisions, responding to agency discovery (one week was consumed in going to and from Washington to be deposed and deposing ROSENTHAL), trying to undertake his own discovery, etc.

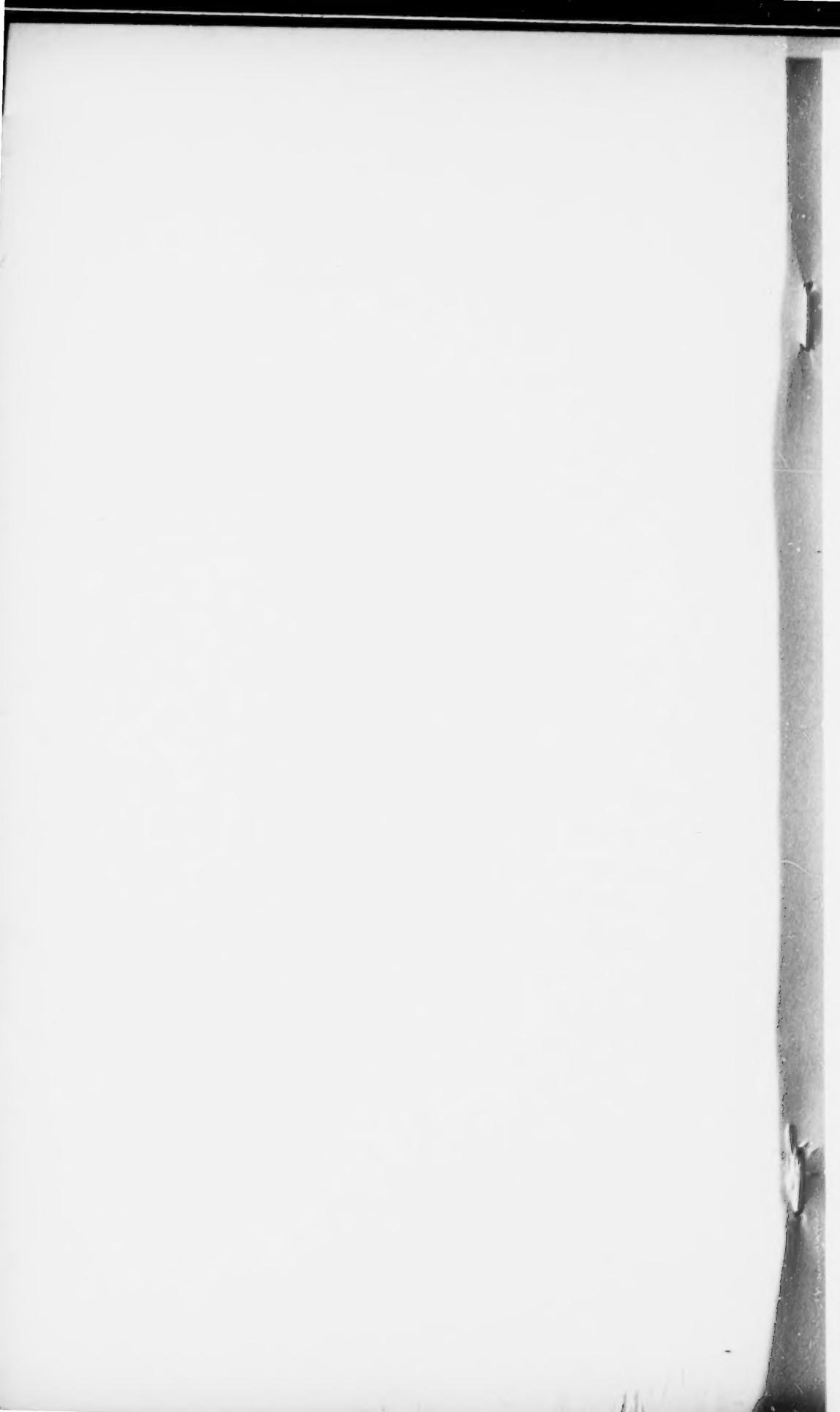


REIDY concedes (Appendix C, p. 53) that BURRIS timely moved for enlargements of time but at all times denied them and rigidly adhered to the press-release-hearing-date. At no time did the agency oppose the motions for continuance on the ground of undue harm to the agency or otherwise.

Absent any indication of lack of diligence on the part of the employee in notifying the presiding official of scheduling conflicts, or any evidence that a postponement would have caused undue harm to the agency, the employee showed "good cause" for the granting of such postponement and the presiding official erred in denying the request.

Roberson v. Department of Health and Human Services, MSPB 1984, 24 MSPR 240.

All the acts alleged against BURRIS occurred in Montana and all the witnesses

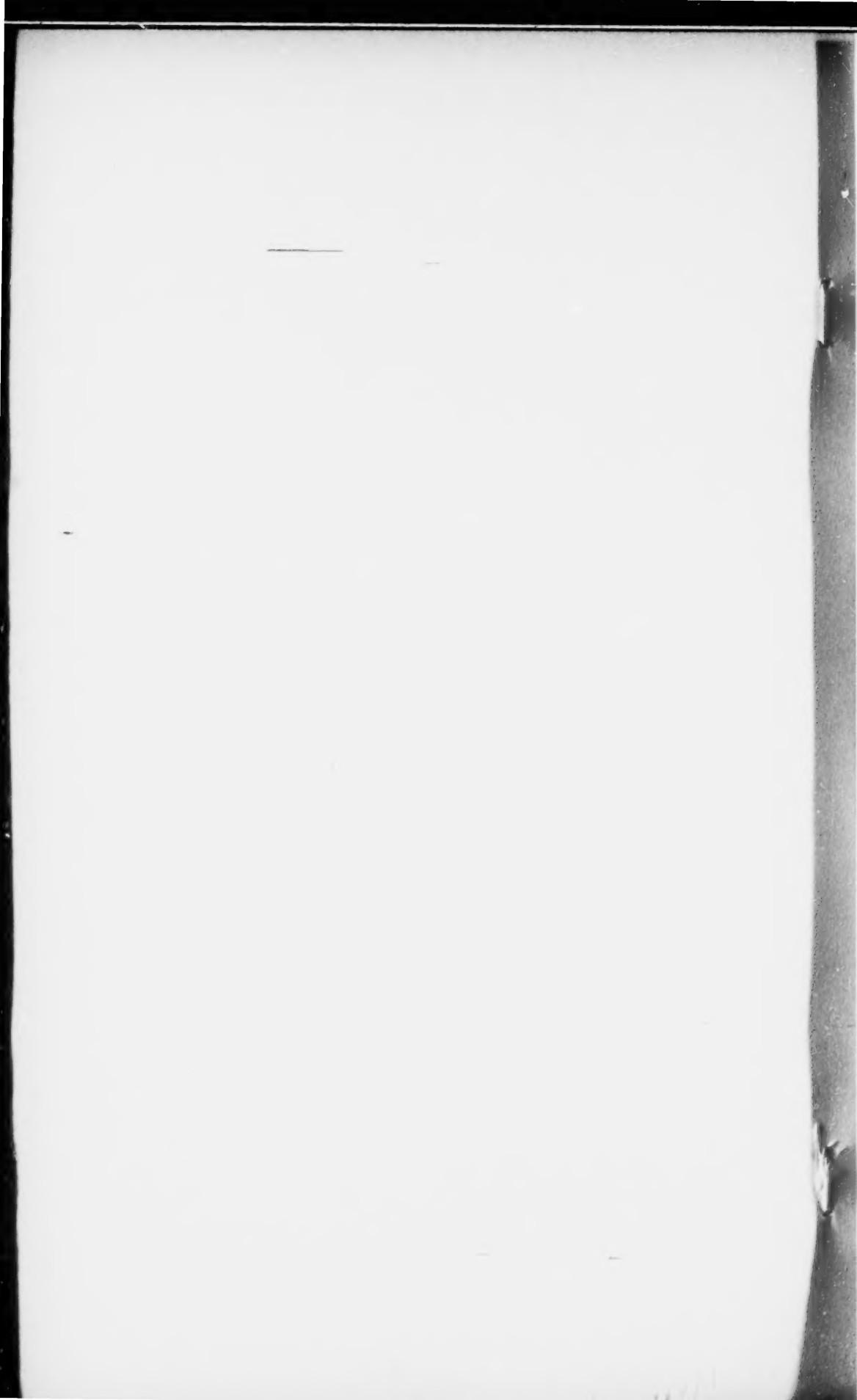


were there. REIDY ruled, over BURRIS' objections, that the hearing would be in Washington and that, if he so decided, some testimony might be taken in Billings.

...the hearing before the presiding official of the MSPB is the only opportunity which a discharged employee or one subjected to an adverse personnel action has to a de novo trial before an impartial judge. See, 5 USC 7701, 7703... Frampton v. Department of Interior, 801 F.2d 1486, 1489.

Due process requires an impartial and objective judge. Haughton v. Byers (1979), Dist. Col. App.), 398 A.2d 18, 6 ALR4th 945.

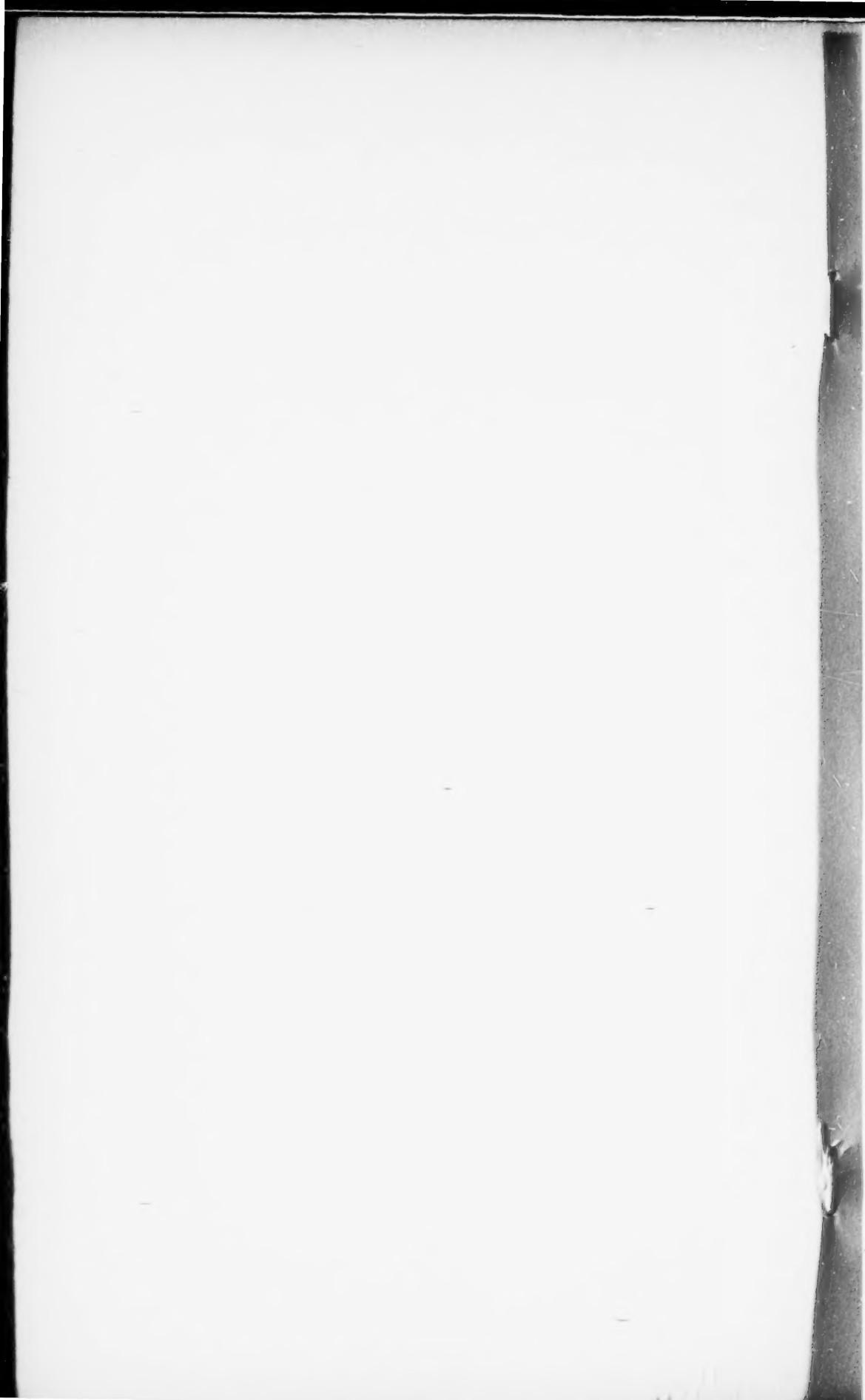
There was absolutely nothing fair, impartial, etc., about REIDY. BURRIS' grounds for disqualification of REIDY included, but were not limited to, REIDY's ex parte communications with agency counsel, REIDY's acting as chief



trial counsel for the agency (e.g., entering objections for the agency, etc.), and were totally uncontradicted.

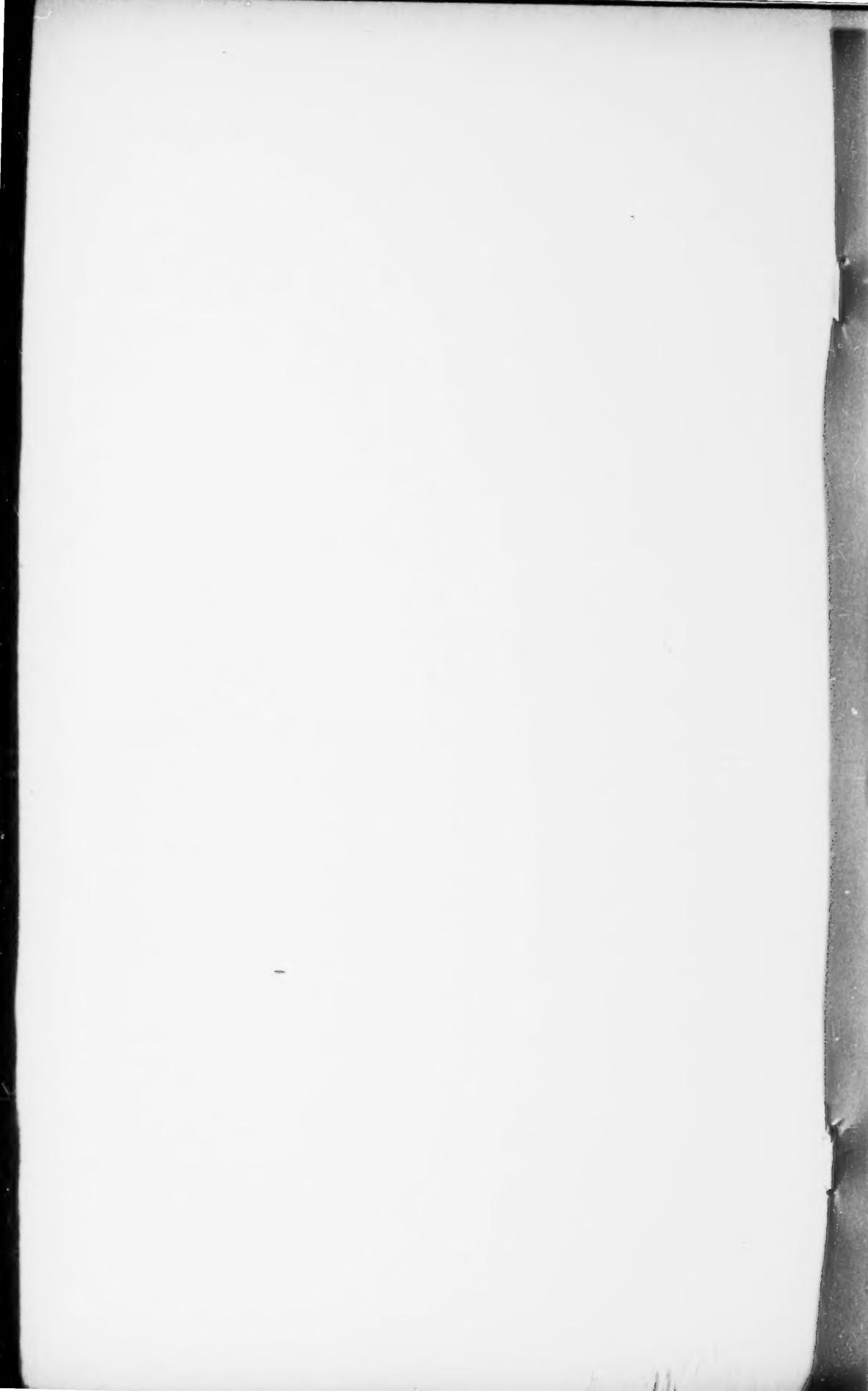
BURRIS timely moved to disqualify REIDY under 28 USCA 144 and MSPB regulations which require a hearing and ruling on the motion. (5 C.F.R. 1201.42; Appendix F, p. 125.) No hearing was ever held on the motion and no ruling was issued. Instead, the MSPB's decision says the motion vilified REIDY and that BURRIS was guilty of comparable excesses relating to other individuals without identifying the same. (Appendix B, p.8.)

BURRIS' motion to disqualify was just one of the many instances where the MSPB refused and failed to follow its own regulations. (An agency is required to follow its own regulations. Bowen v. City of New York, 476 U.S. 467, 106 S. Ct. 2022, 90 L.Ed.2d 462.



BURRIS did not receive a de novo hearing. At each step, REIDY simply assumed that the agency was correct. Example: The mechanics of the HHS grievance procedure for nonbargaining unit employees, which included BURRIS, are as follows. HIARING decides he wishes to do something. He first checks with RUCKER, the RCALJ, who checks with ROSENTHAL, the CALJ, etc. They approve the action and HIARING puts it into force and effect. BURRIS files a grievance. The first person to rule on the grievance is HIARING, followed by RUCKER, then ROSENTHAL, etc. In each and every grievance, management decided in its own favor. No de novo review of grievances, EEO matters, etc., was permitted.

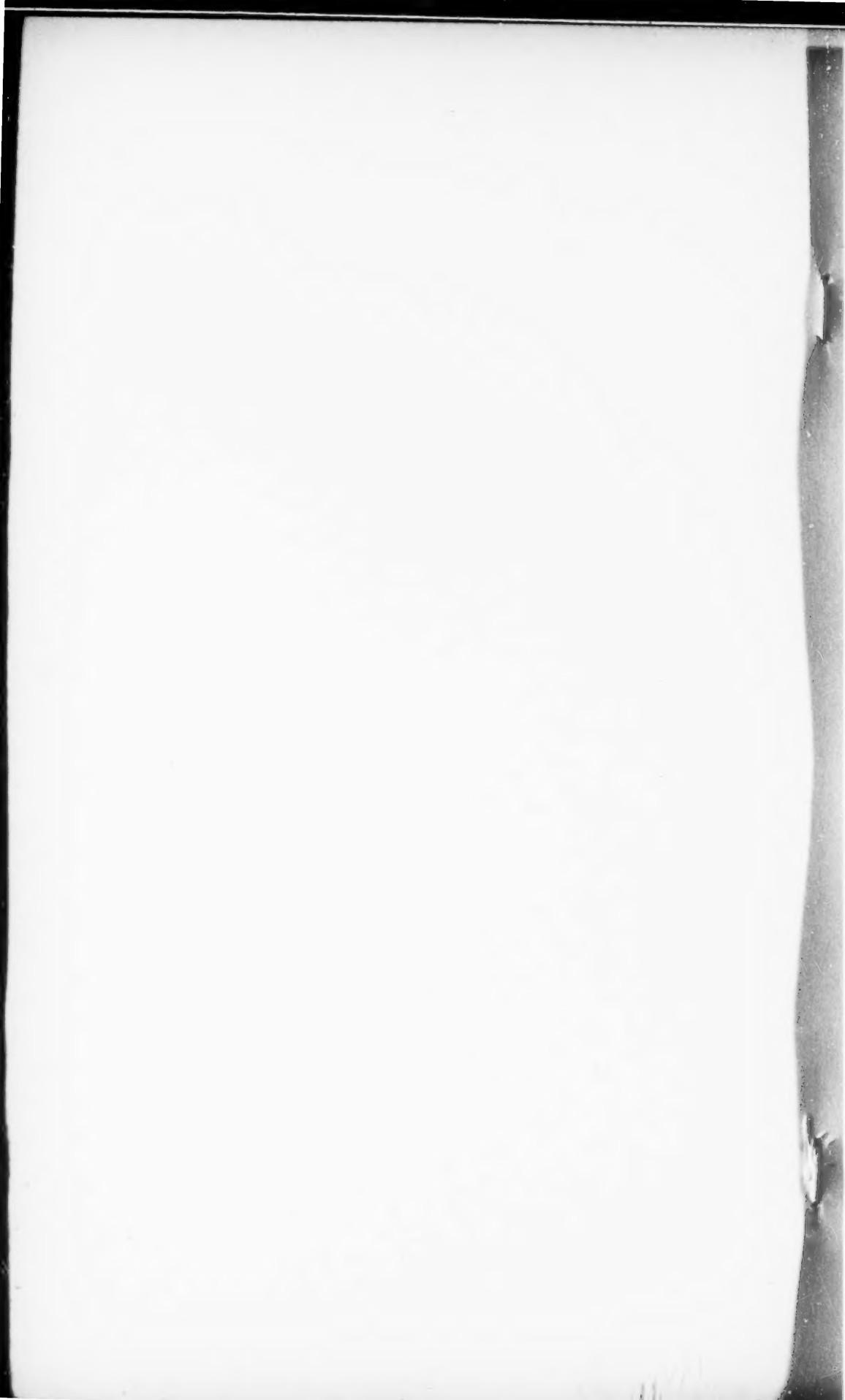
Under the due process clause, the right to a full hearing includes the right to introduce evidence and have



judicial findings based upon it.

Baltimore and O. R. Co. v. United States,
(1936), 298 U.S. 349, 80 L.Ed. 1209, 56
S.Ct. 797; Frampton, supra, at 1489.

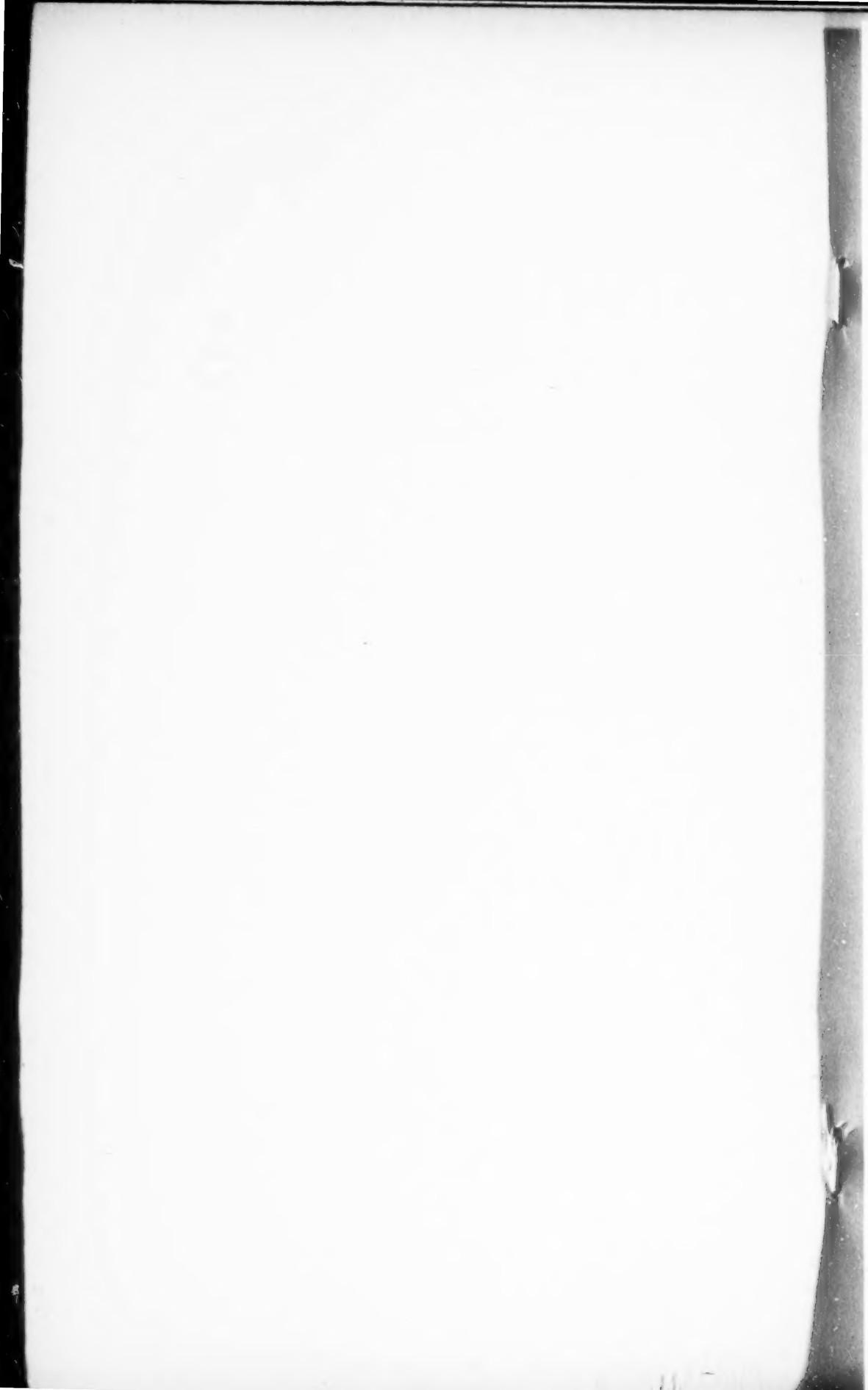
In 1986, the Federal Circuit held that an employee before the MSPB is entitled to present all "witnesses" and raise "every available defense". Frampton v. Department of Interior, 801 F.2d 1486, 1488. BURRIS was denied both rights. Instead, the decisions strictly limited BURRIS to (1) the issues and (2) time frame of the removal complaint. Thus, BURRIS could not show defenses of the agency's pattern/practices, retaliation for his whistleblowing, grievances and EEO complaints, discrimination, bias, partiality and animosity of HIARING/RUCKER/ROSENTHAL, differing standards of behavior for management and other employees,



management prohibited personnel practices, etc.

"The (Federal Labor Relations) Authority's ruling seems to suggest that the standards of expected behavior for unit employees and managerial employees might differ..." But the government must not have different standards of discipline for supervisors "just because they perform different duties." North Germany Area Council, etc. v. FLRA, 805 F.2d 1044.

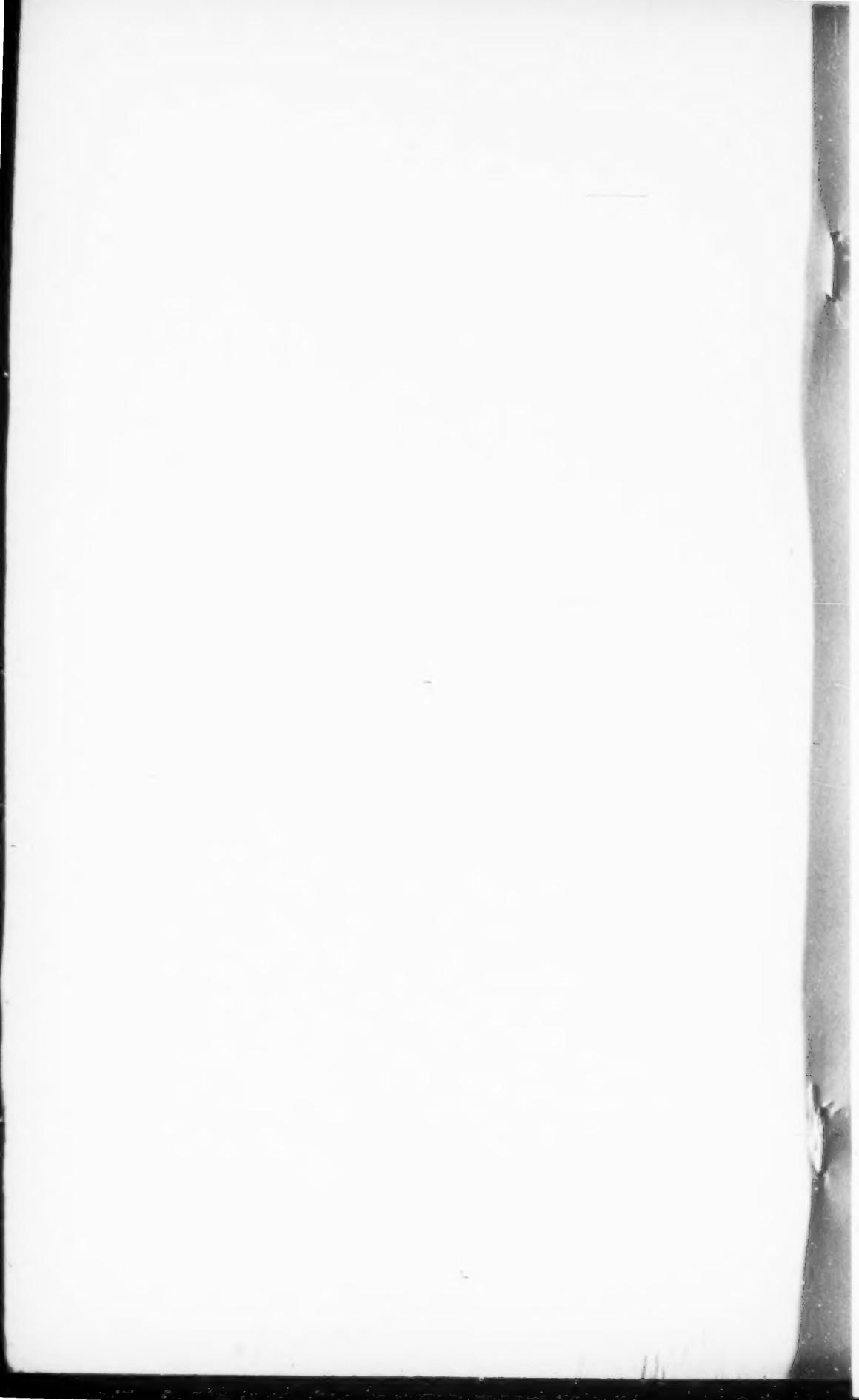
When the employee contended that his removal on charges of fighting with a co-worker was actually the result of his supervisor's animosity, the presiding official abused his discretion in refusing to permit the employee to introduce additional testimony to substantiate his claim of bias on the part of the supervisor. Edmond v. TVA,



MSPB 1984, 23 MSPR 489. (The employee may also show the bias and partiality of supervisors. Frampton, supra, p. 1489). In short, contrary to the Federal Rules of Evidence, Rule 406, and other authorities, BURRIS was not permitted to show the pattern/practice of management.

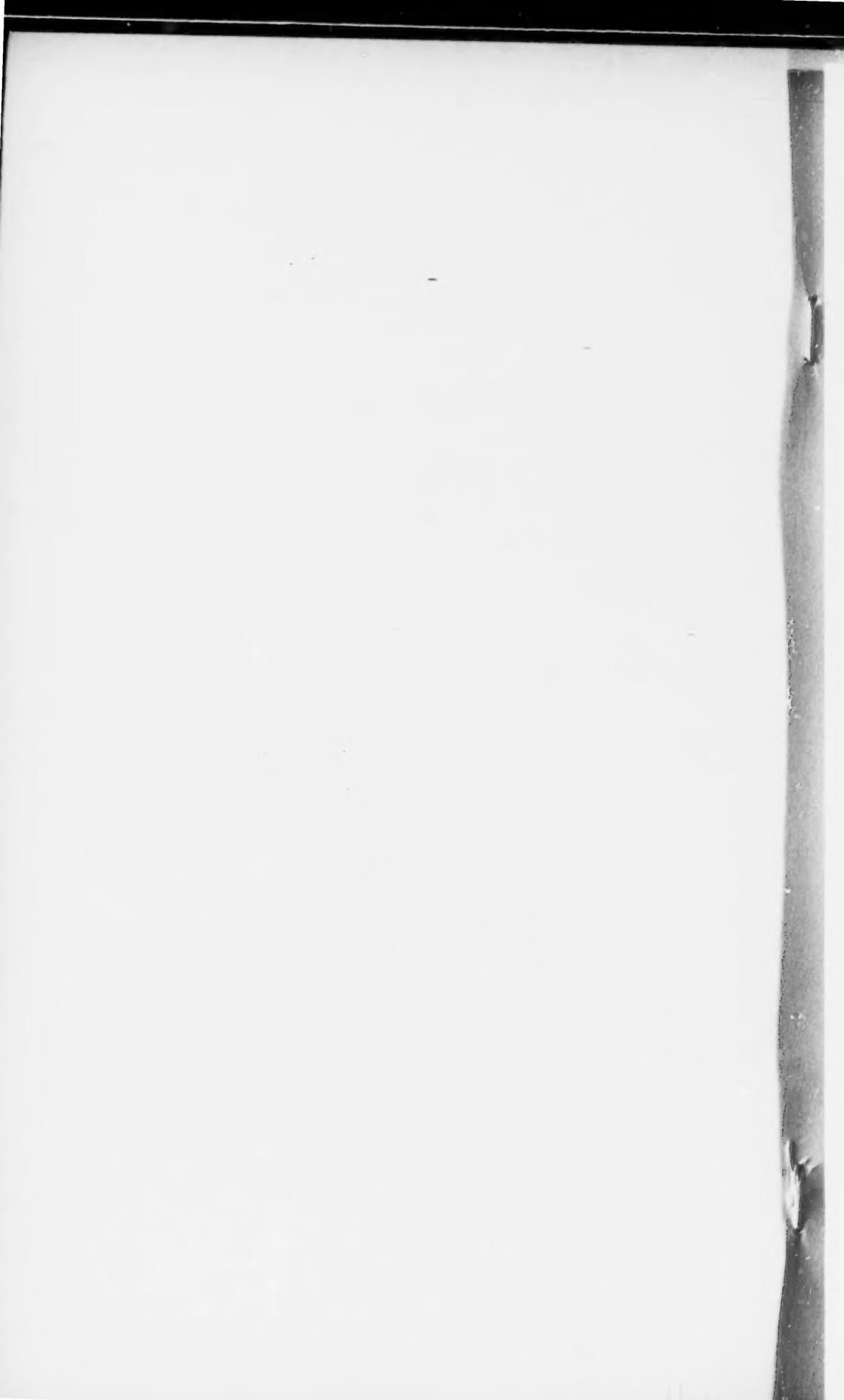
The MSPB found BURRIS' "...conduct, the start of which coincided with his being replaced as the Acting ALJIC of his office,..." impaired office operations and was the product of BURRIS' "intent to get even,..." for having been replaced as ALJIC. (Appendix B, p. 18.)

Judge Sheldon Shepherd was present in the Billings OHA office during part of the time BURRIS was ALJIC. Judge Shepherd, the only witness BURRIS was permitted to call in Washington, testified before REIDY that his initial reaction on seeing the removal-complaint



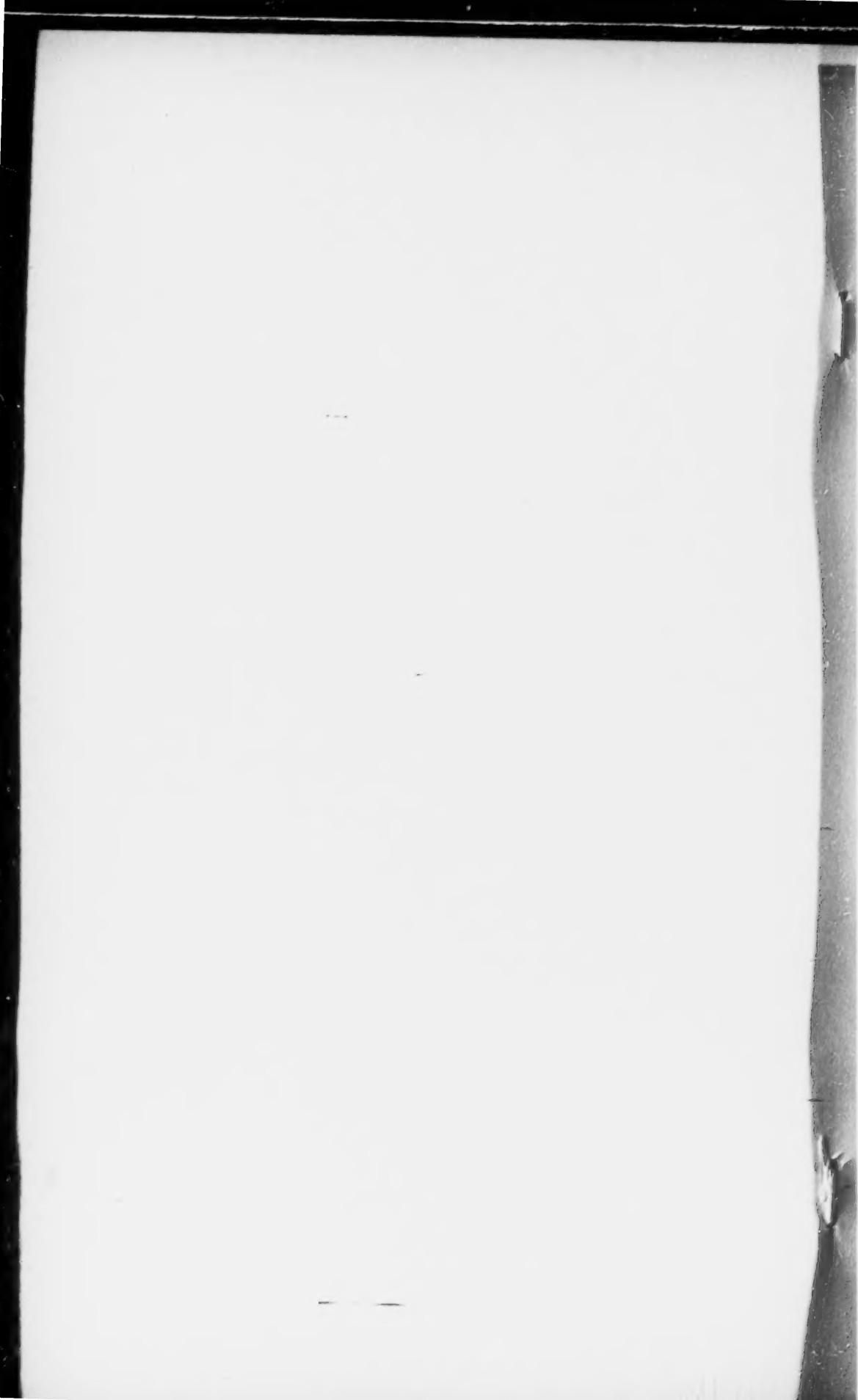
against BURRIS was "I think I probably said, they are complaining against you doing what they did to you (when you were ALJIC)". (Tr. IV-96/1-5.) His testimony is uncontradicted.

REIDY's findings show the problems between management and BURRIS commenced long before March 1984. While precluding BURRIS from showing what occurred before March 1984, REIDY found that: for many years, the Billings OHA office was a tense work environment; interpersonal conflicts were rife; few, if any employees were free from being "considered a source of the problems"; the "entire Billings office was beset with personality conflicts, name-calling, and rumors"; and, even HIARING made a derogatory remark about STEADMAN. (Appendix C, p. 77.) But only BURRIS was singled out for agency action and BURRIS



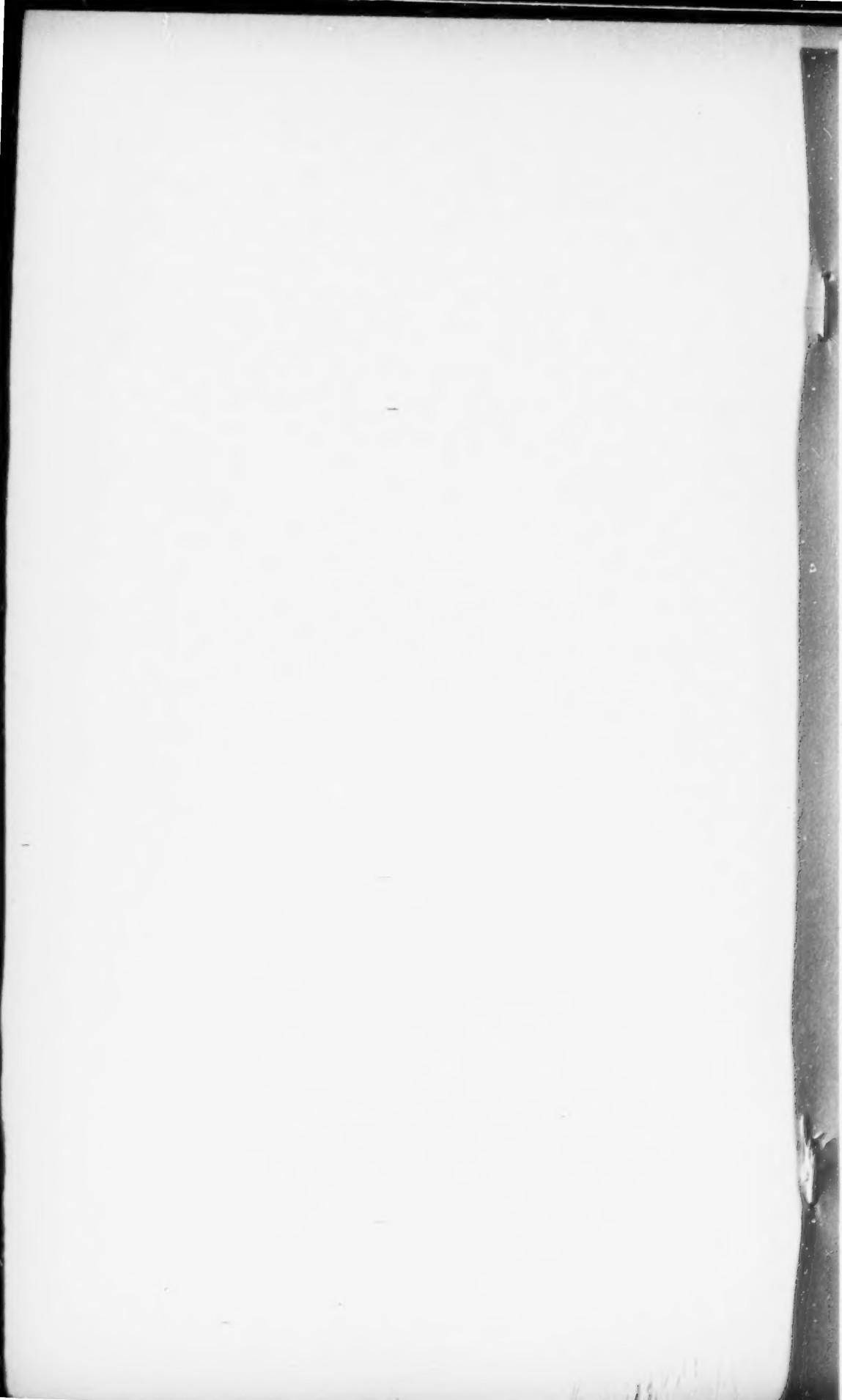
was not permitted to show what took place and why.

In addition to precluding the above defenses, the decisions hold that, BURRIS cannot raise any issue by way of defense or otherwise unless the agency first charged itself with the conduct. Examples: (1) The agency repeatedly argued that "...The Board has already ruled that these allegations are not included in the charges before it and are not relevant to this case." (2) In response to BURRIS' stating that he wanted to show certain management conduct as a defense REIDY said: "They are not charged, sir. Any other motions you might have?" (Tr. 1/12/2-3.) (3) The agency was permitted to show the names BURRIS called agency management. BURRIS was not permitted to show that management called him "son of a bitch", told people



BURRIS had a high reversal rate because he accepted bribes and kickbacks, physically used a gun against BURRIS in the effort to stop the latter's whistleblowing, etc. (4) The agency was permitted to argue that BURRIS violated the HHS grievance procedure by the number of grievances he filed, but BURRIS was not permitted to show the agency's abuses of the procedure with respect to the same grievances.

...the presiding official... denied the employee the opportunity to testify that his removal constituted a prohibited personnel practice because of the bias and partiality of his supervisor,...* *such a limitation on an appellant's right to testify and defend against an agency action would render nugatory the right of appellant to a meaningful hearing pursuant to U.S.C. Section 7701(a) and Section 1205(a)(1) of the Civil Service Reform Act of 1978... Frampton v. Department of Interior, 801 F.2d 1486, 1488-1489.



Whether before or after BURRIS's removal as ALJIC, most of the acts of management complained of by BURRIS, e.g., discrimination, use of guns, name calling, abuses of the EEO and grievance procedures, etc., are prohibited personnel practices. BURRIS is entitled to show "merits abuses and patterns of prohibited personnel practices", Horner v. MSPB, 815 F.2d 668, 675, but was denied that right.

BURRIS has continuously been a whistleblower about the management of the OHA, SSA and HHS since early 1976. Example: See letter from U.S. Senator Carl Levin to REIDY, February 17, 1987, concerning his Oversight Subcommittee's investigator of the OHA, SSA and HHS "over four" (4) years and BURRIS' contributions thereto. (Appendix G, p. 128.) Since this investigation started



in approximately 1982, it was outside the time-frame of the complaint and, since the agency did not charge itself with retaliating for BURRIS' whistleblowing, it was outside the issues of the removal complaint, therefore, BURRIS could not show retaliation/harassment for his whistleblowing. In addition, Senator Levin was one of the people BURRIS wanted as a witness, but REIDY summarily denied the matter. After denying BURRIS all rights to produce evidence of retaliation for whistleblowing, REIDY then found no evidence of retaliation. (Appendix C, p. 63.)

After precluding BURRIS from showing what occurred during his "stewardship" as ALJIC, REIDY found that BURRIS was relieved as ALJIC due to "dissatisfaction with his stewardship". (Appendix C, p. 56.)

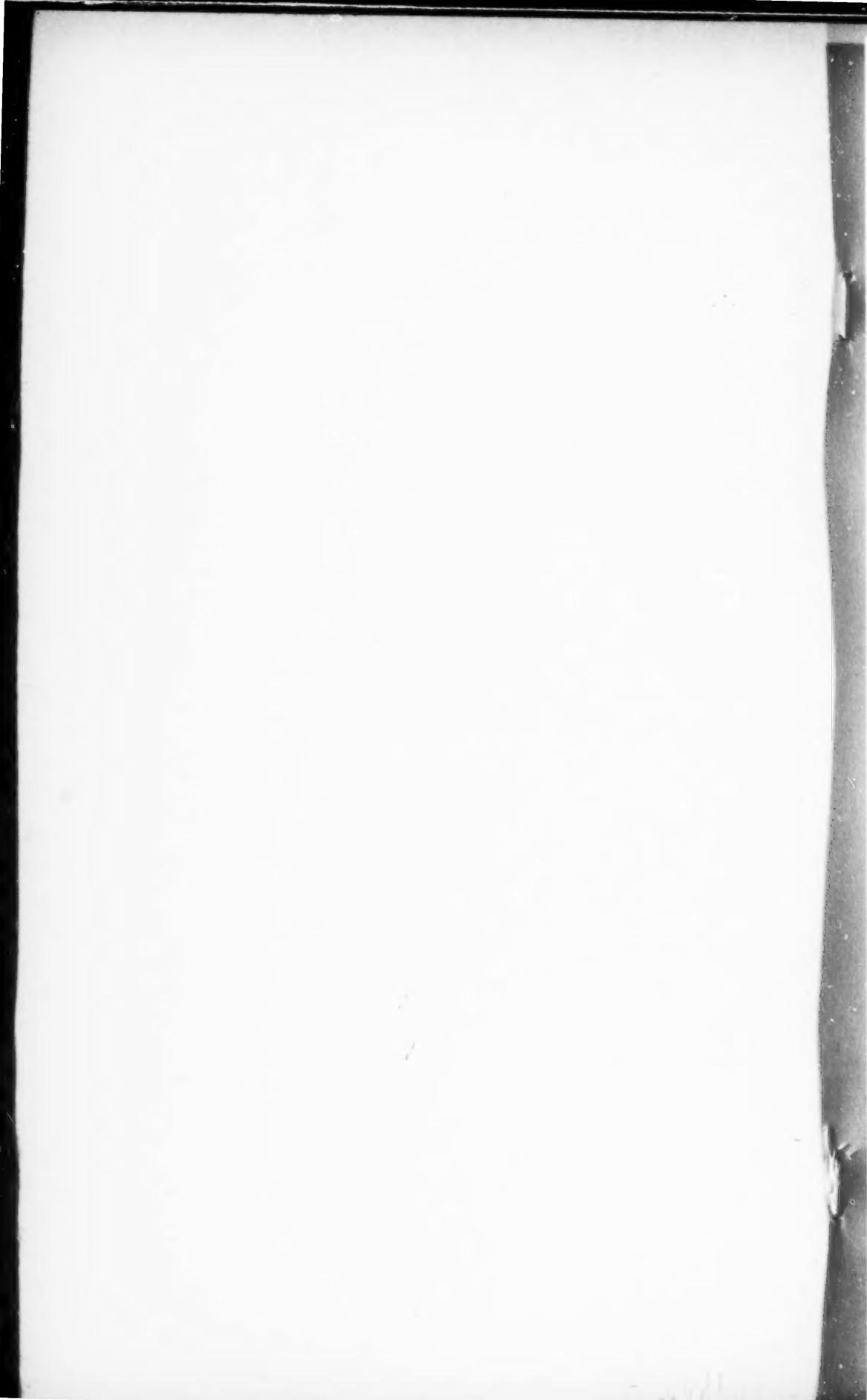


In addition to limiting BURRIS to the issues and time frame of the removal-complaint, REIDY further limited the case to a "sampling" of facts/evidence. Example: REIDY admits he used a "sampling" of grievances filed by BURRIS but does not identify them. (Appendix C, p. 86.)

BURRIS was never told or shown which "samples" would be used and given an opportunity to defend against the same.

Although never given the specific facts of the removal compliant, BURRIS was required to designate witnesses. He did so by setting forth all "witnesses" that might have knowledge of the vague "general" allegations made. REIDY immediately objected that this was objectionable on its face.

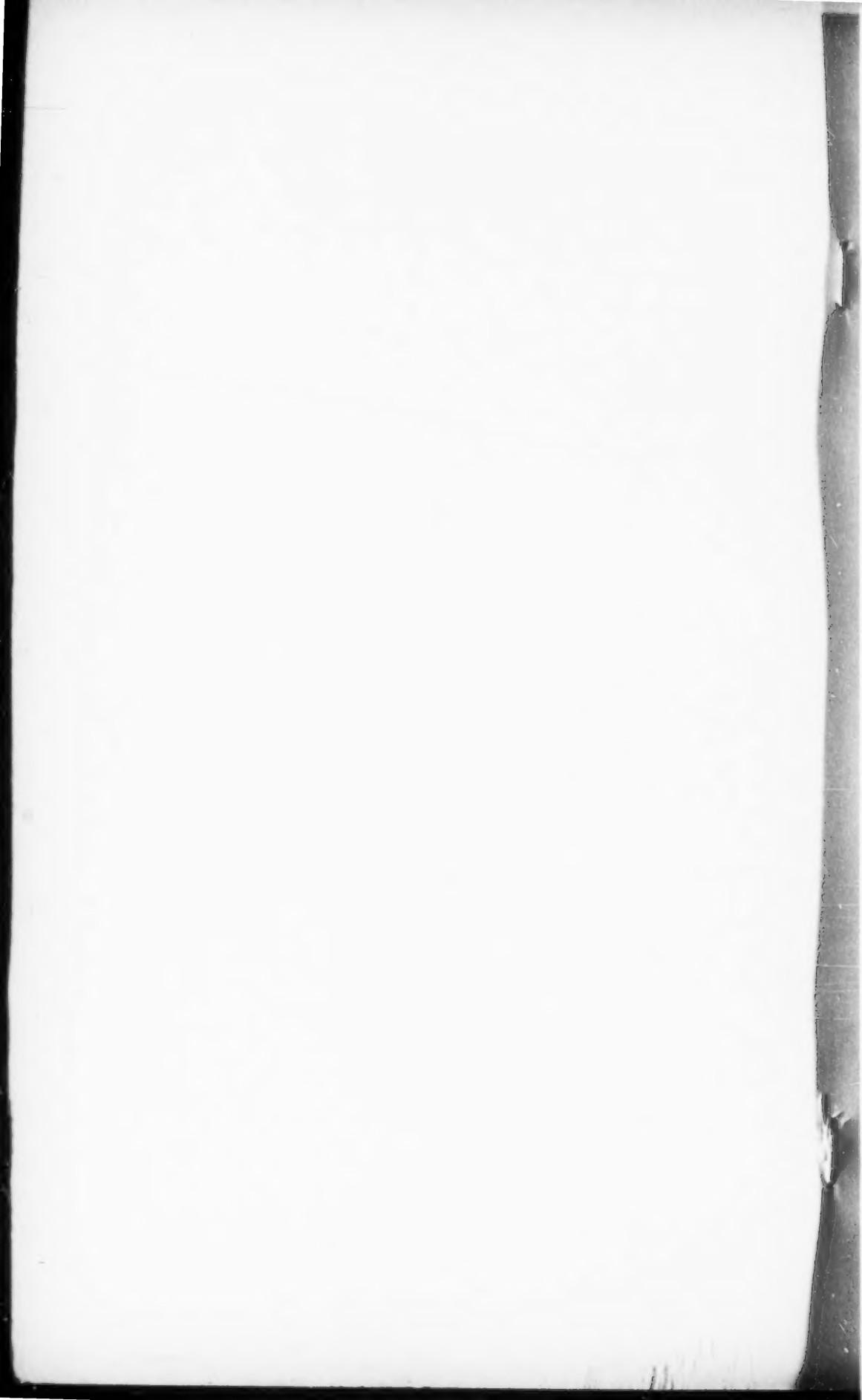
At the conclusion of the hearing in Washington late Friday, BURRIS learned



for the first time that (1) there would be a "hearing" (by depositions only) in Billings commencing the following Wednesday and (2) the witnesses he would be permitted to depose.

On arrival in Billings, BURRIS learned that REIDY had unilaterally and arbitrarily excused one of BURRIS' witnesses Verna FISHER (FISHER) for Billings, and directed that BURRIS simply select another witness (as though all witnesses had the same knowledge of facts, etc.). BURRIS protested. REIDY then held BURRIS had to take her testimony by interrogatories.

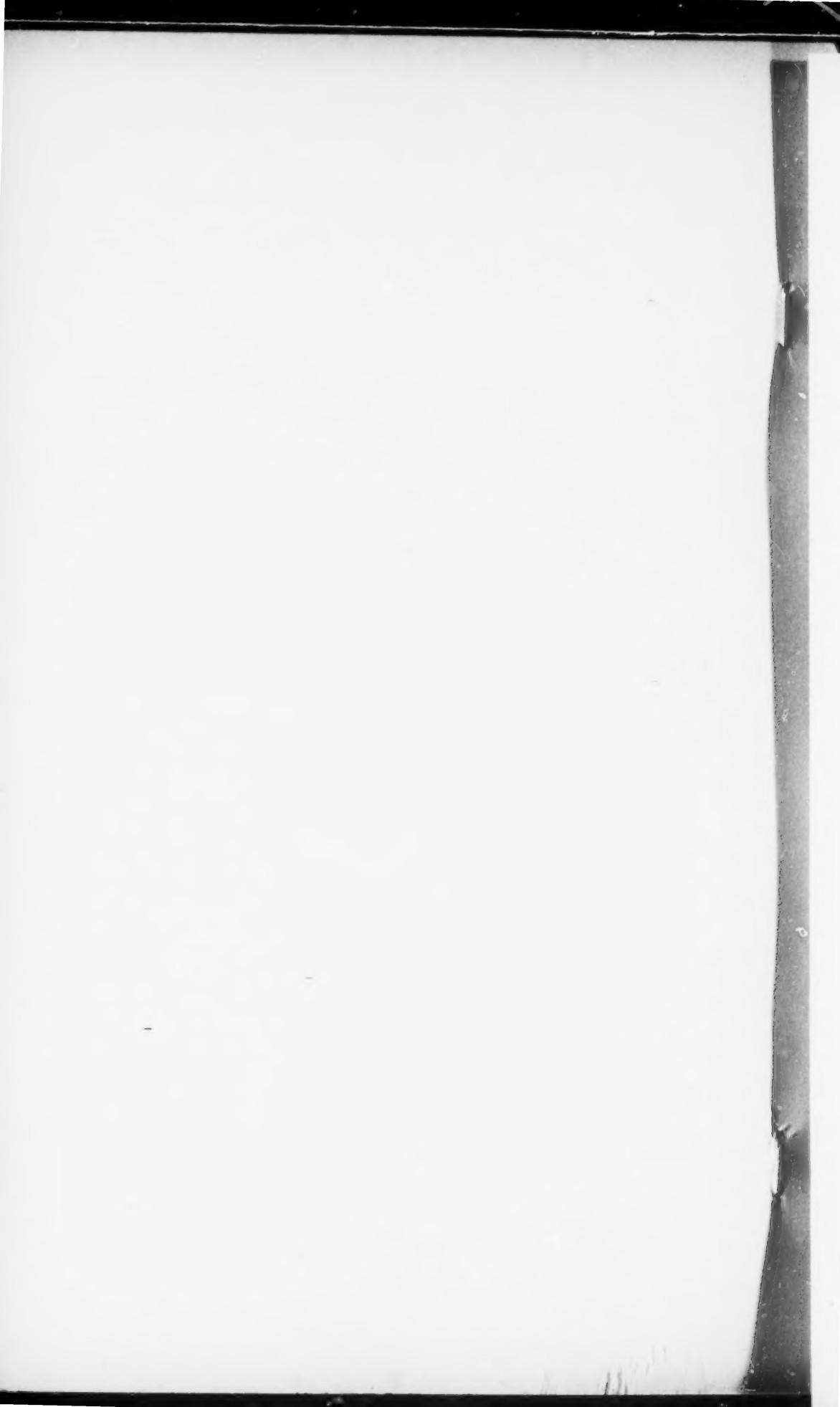
Billings OHA Office personnel were placed under a "gag" order in 1984 as to talking to BURRIS. In her answers to interrogatories, FISHER testified that no one ever told her the gag order was removed. She also testified that she was



fearful of retaliation if she testified. (This was corroborated by two other witnesses.)

Witnesses in the Billings OHA office were also fearful of retaliation as they had personally witnessed an earlier incident where BURRIS had two office personnel testify in one of his hearings and both were disciplined by HIARING, RUCKER and ROSENTHAL, not for failing to tell the truth but because their truthful testimony did damage to the "management team concept." At no time did REIDY assure any of the witnesses that they were required to testify to the truth and that they would be protected from retaliation/harassment for so testifying.

REIDY found that BURRIS defamed management (Appendix C, p. 83) and precluded BURRIS from showing that management defamed BURRIS by calling him



a son of a bitch, etc., supra. BURRIS was also precluded from showing that if he said what was alleged, it was the truth. (Appendix B, p. 25.)

BURRIS was clearly denied his right of free speech. (First Amendment, Appendix D, p. 122.)

The evidence shows that only BURRIS and HIARING/STEADMAN had keys to BURRIS' office. The building management, janitors, etc., did not have keys. HHS regulations require that advance written authorization be obtained by a supervisor before he/she can search an employee's desk. The evidence shows HIARING and others repeatedly searched BURRIS' office, desk, credenza and files and took items therefrom without the requisite authorization. STEADMAN admitted that she took a copy of a letter BURRIS wrote to the Honorable Ted Weiss, U.S. House of



Representatives. In one instance, HIARING stole money from BURRIS' office. The decisions at bar hold BURRIS cannot complain about thefts, the taking of his credenza, etc., because, as a government employee, he did not have a "property interest" therein.

For government employees, "Fourth Amendment privacy interests do not, however, turn on property interests. That notion was put to rest by the Supreme Court in Katz v. United States, 398 U.S. 347..." BURRIS has a right of privacy "in his desk and credenza", office and drawers and files within said office. Schowengerdt v. General Dynamics, etc., (CA9 1987), 823 F.2d 1328, 1333-1334.

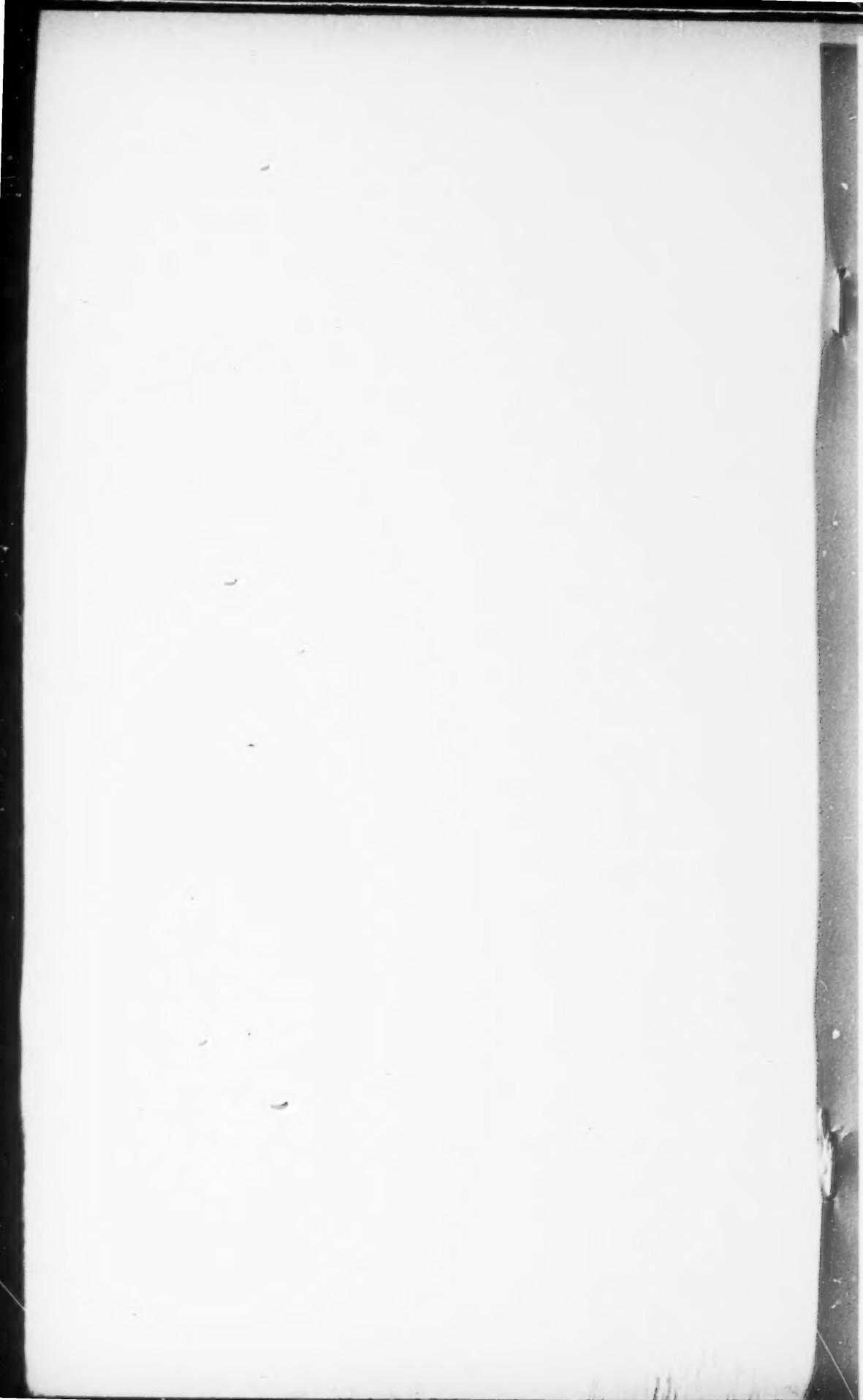
The MSPB's regulations provide that discrimination can be raised at any time and the case then becomes a "mixed" case



and all issues are to be resolved. (Appendix F, pp. 126-127.) BURRIS fully apprised REIDY of the discrimination issue by giving him a complete copy of the U.S. District Court complaint.

REIDY and the MSPB refused to comply with MSPB regulations because the initial discrimination complaint was outside the issues and time frame of the removal complaint and, in addition, the agency did not charge itself with discrimination, therefore, BURRIS could not raise the matter as a defense.

The Circuit Court held BURRIS did not present evidence on the discrimination issue. (Appendix A, p. 3.) BURRIS was not permitted to do so under REIDY's ruling. By presenting REIDY with a copy of the federal lawsuit at the outset, BURRIS did all he could to raise the issue. Further, as the federal



lawsuit alleged, and to and including the date of this petition, BURRIS has not received a right-to-sue letter concerning his initial EEO complaint filed in February, 1984. And, the EEO components of HHS and/or the EEOC are still sitting on the charge of retaliation BURRIS filed concerning the removal-action as retaliation.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has, among other things: (1) Created a conflict with its decision in Frampton, supra. (2) Departed from prior law and MSPB regulations that an employee may raise an issue of discrimination at any stage of the proceeding. (3) Rewritten the Civil Service Reform Act (CSRA) to read that an employee before the MSPB cannot raise any type of defense unless it is (a) within the time-frame and issues of the removal-

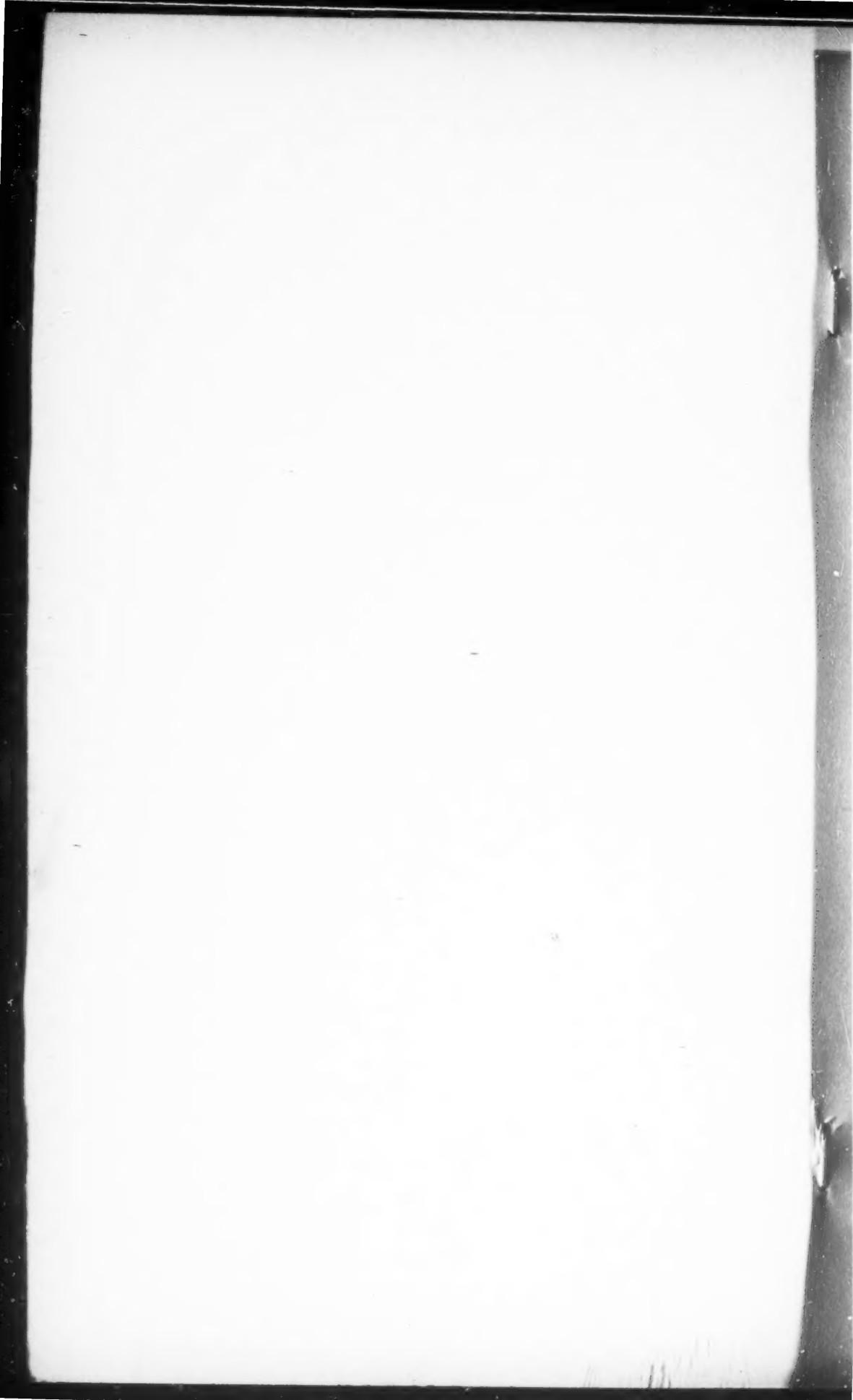


complaint, and (b) the agency charges itself with the conduct. (4) Held that an employee is not entitled to a de novo hearing and is only entitled to a "sampling" of facts/evidence with no right to know what comprises the "sample". (5) Requires an employee to raise issues of discrimination, etc., even though the MSPB has precluded such evidence. (6) Held an agency is not required to follow its own regulations. (7) Etc.

The Court's departure from the accepted and usual course of judicial proceedings calls for an exercise of this Court's power of supervision.

CONCLUSION

For the reasons stated and the authorities cited, Petitioner prays that the Court grant this petition for a writ of certiorari.



28 U.S.C. § 2403(a) may be applicable herein. The constitutional question has not heretofore been certified to the Attorney General.

DATED this 1st day of August, 1989.


DON EDGAR BURRIS, Esq., Pro Se
2251 South 56th Street West
Billings, Montana 59106
(406) 656-8026



SERVICE, FILING AND VERIFICATION

STATE OF MONTANA)
COUNTY OF YELLOWSTONE)

VIRGINIA BIGLER BURRIS, being first
duly sworn, deposes and says.

On August 1, 1989, Affiant mailed three (3) true and correct copies of the within Petition for Writ of Certiorari to each of the following:

Solicitor General
Department of Justice
Washington, D.C. 20530

Eileen M. I. Houghton
Attorney at Law
Dept. of Health and Human Services
Office of General Counsel
Room 5362, North Building
330 Independence Ave., S.W.
Washington, D.C. 20201

by depositing the same in the U.S. mail postage prepaid, pursuant to Rule 28.4 and 28.5 of the Rules of the Supreme Court of the United States.

FURTHER AFFIANT SAYETH NOT

Ginger Bigler B.
GINGER BIGLER BUTTER

STATE OF MONTANA

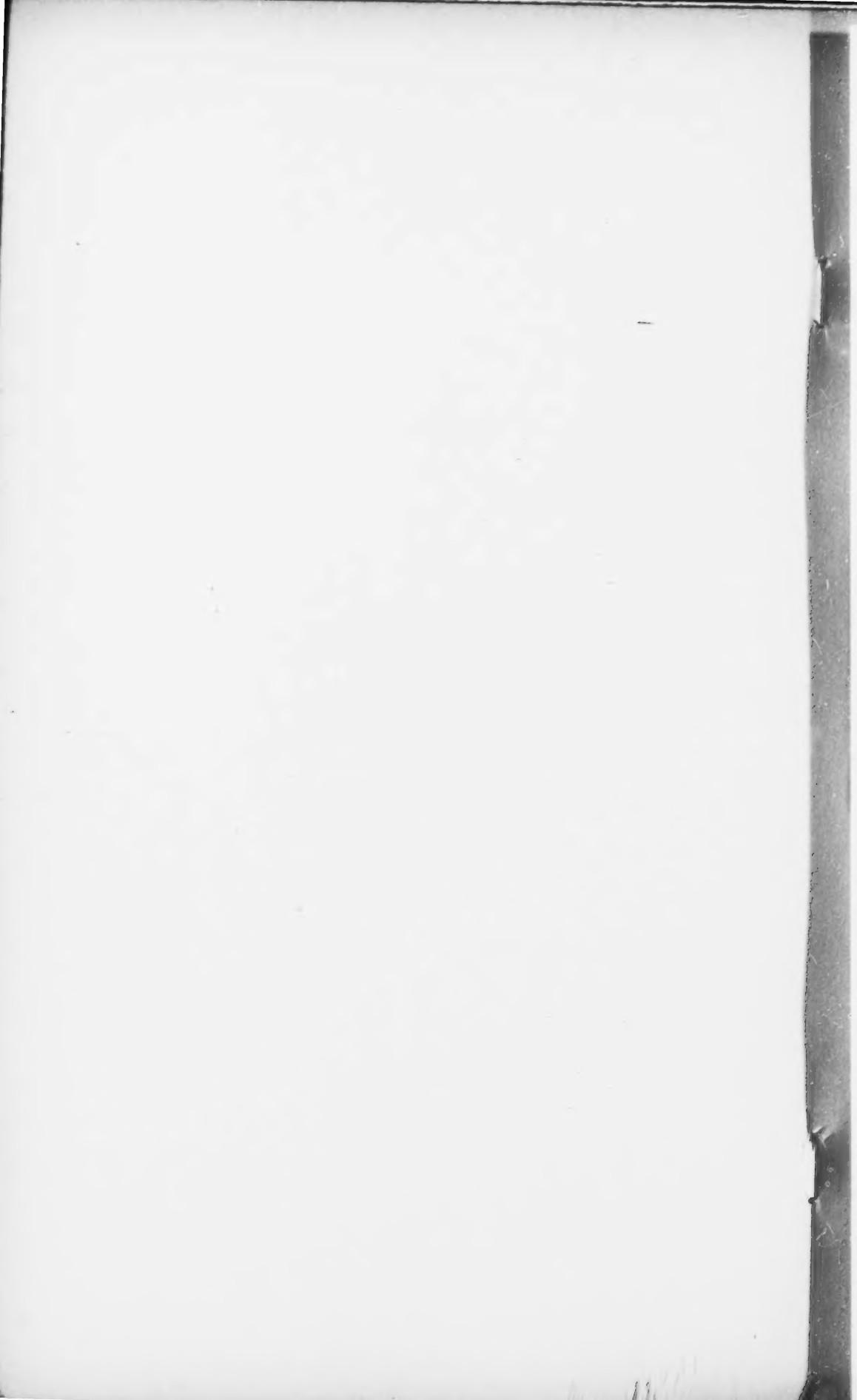
COUNTY OF YELLOWSTONE



On this 1st day of August, 1989,
personally appeared before me GINGER
BIGLER BURRIS known to me to be the
person whose name is subscribed hereto
and acknowledged that she executed the
same.



DON EDGAR BURRIS
Notary Public for Montana
Residing in Billings
My Commission expires: 3/8/91



APPENDIX

Decision of the Court of Appeals for the Federal Circuit	A	1-3
Decision of the MSPB.	B	4-48
Recommended Decision by the Merit Systems Protection Board's in-house Administrative Law Judge (ALJ), Edward Reidy (REIDY)	C	49-121
Constitutional and Statutory Provisions	D	122
Statutes	E	123-124
Regulations	F	125-127
Letter dated February 17, 1987, from Carl Levin to Honorable Edward J. Reidy	G	128-129



Note: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

89-3054

DON EDGAR BURRIS,

Petitioner,

v.

SOCIAL SECURITY ADMINISTRATION,
DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

DECIDED: May 11, 1989

Before MARKEY, Chief Judge, SKELTON,
Senior Circuit Judge, and NEWMAN, Circuit
Judge.

PER CURIAM.

DECISION

The order of the Merit Systems
Protection Board (board), 39 M.S.P.R. 51

APPENDIX A 000001



(1988), authorizing removal of administrative law judge Don Edgar Burris for, inter alia, "insubordination, disruption and unprofessional actions amounting to open contempt and defiance of administrative authority" and "malicious use of HHS grievance procedures," is affirmed.

OPINION

Burris' scattershot attack on the agency and the administrative law judge fails to convince us that the board's order is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or obtained without procedures required by law, rule, or regulation having been followed, or unsupported by substantial evidence. 5 U.S.C. Section 7703(c) (1982); see Brennan v. Social Security Administration, 787 F.2d 1559, 1563 (Fed.

APPENDIX A 000002



Cir. 1986), cert. denied, 107 S. Ct. 573 (1986). We therefore affirm that order.

We also deny Burris' motion to transfer. Burris presented no specific claim of discrimination and no evidence supporting his generalized assertions. See Meehan v. United States Postal Service, 718 F.2d 1069, 1073 (Fed. Cir. 1983).

APPENDIX A 000003



UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SOCIAL SECURITY)
ADMINISTRATION,) DOCKET NUMBER
Agency,) HQ752186100023
v.)
DON EDGAR BURRIS,) DATE: NOV. 3, 1988
Respondent.)
)

Eileen Inglesby Houghton, Esquire
and Daniel J. Edelman, Esquire,
Washington, D.C., for the agency.

Don Edgar Burris, Esquire, Billings,
Montana, pro se.

John Mathias, Esquire, Washington,
D.C. for the amicus curiae,
Federal Administrative Law Judges
Conference.¹

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINIONS AND ORDER

1 The motion of the Federal
Administrative Law Judges Conference to
appear as an amicus curiae, which was
filed after the issuance of the
recommended decision, is hereby granted.

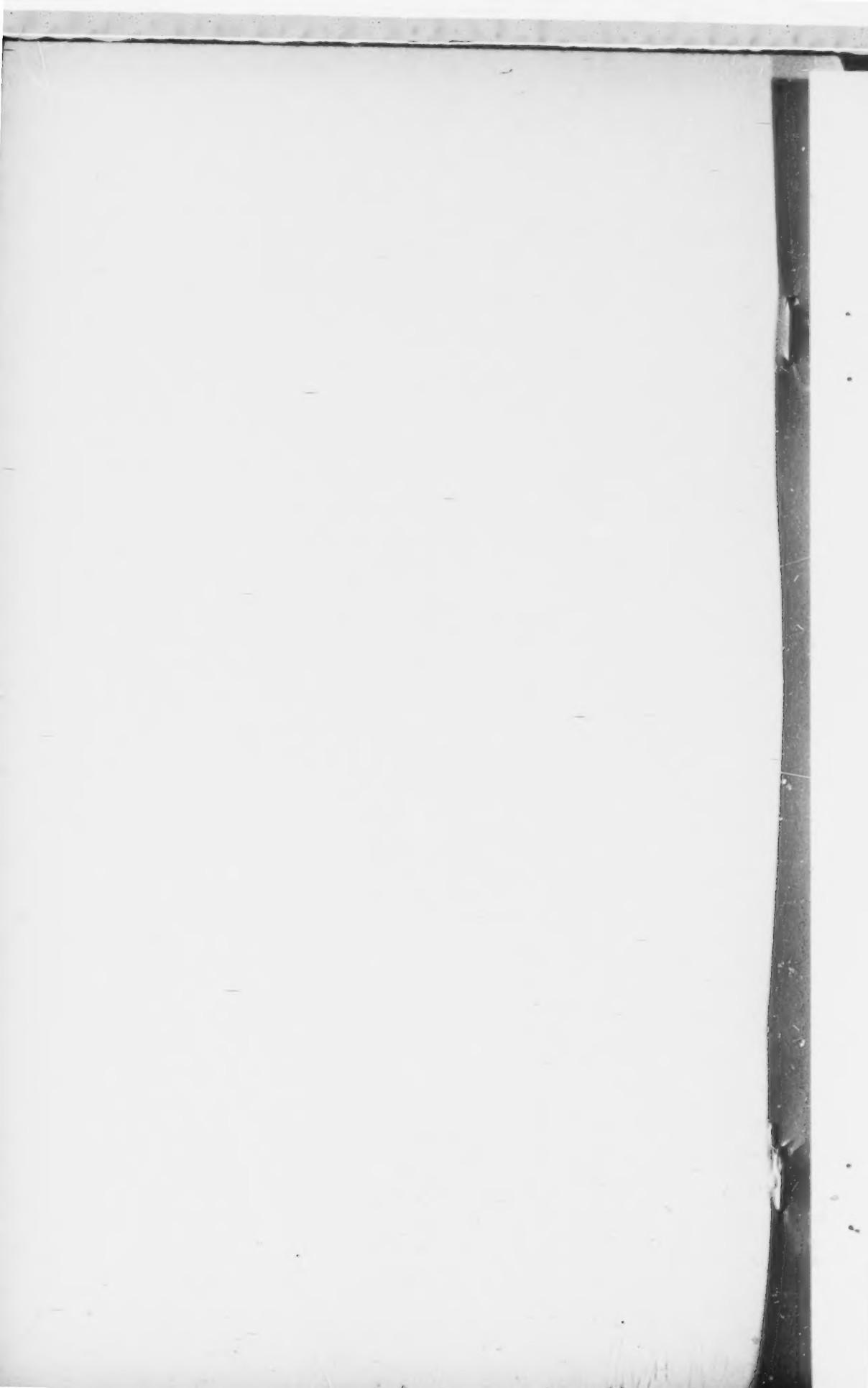
APPENDIX B 000004



Introduction

The Social Security Administration has filed a complaint with the Board seeking an order authorizing it to remove Don Edgar Buntle from the Department service. Mr. Buntle is employed by the Social Security Administration in an administrative law judge capacity in that capacity he adjudicates all administrative cases, claims, and other claimants' requests for Social Security disability benefits. He also insulates administrative records before implementation of proposed rule changes or rule changes. Because of his official position, when administrative rule changes are proposed under Title I and Title II, he must be removed until those rule changes become effective and those changes are implemented.

Complaint to the Board



Conference, 345 U.S. 128 (1953); Social Security Administration v. Goodman, 19 M.S.P.R. 321, 327 (1984). That forum originally was the Civil Service Commission and is now this Board.

Under our regulations, cases brought pursuant to this statute can be referred to an administrative law judge to conduct a hearing and to issue a recommended decision. 5 C.F.R. Section 1201.135(a). This case was so referred, and we now have a recommended decision before us for consideration.

The agency sought permission to remove the respondent on the basis of five charges, each of which was sustained, in whole or in part, in the recommended decision, which concludes that the agency met the statutory standard and established that "good cause" exists to authorize respondent's



removal. We agree that good cause exists to discipline the respondent, although we do not believe that good cause was established in charge 4. Therefore, for the reasons set forth below, we ADOPT the recommended decision, as MODIFIED, and incorporate it in this final decision.

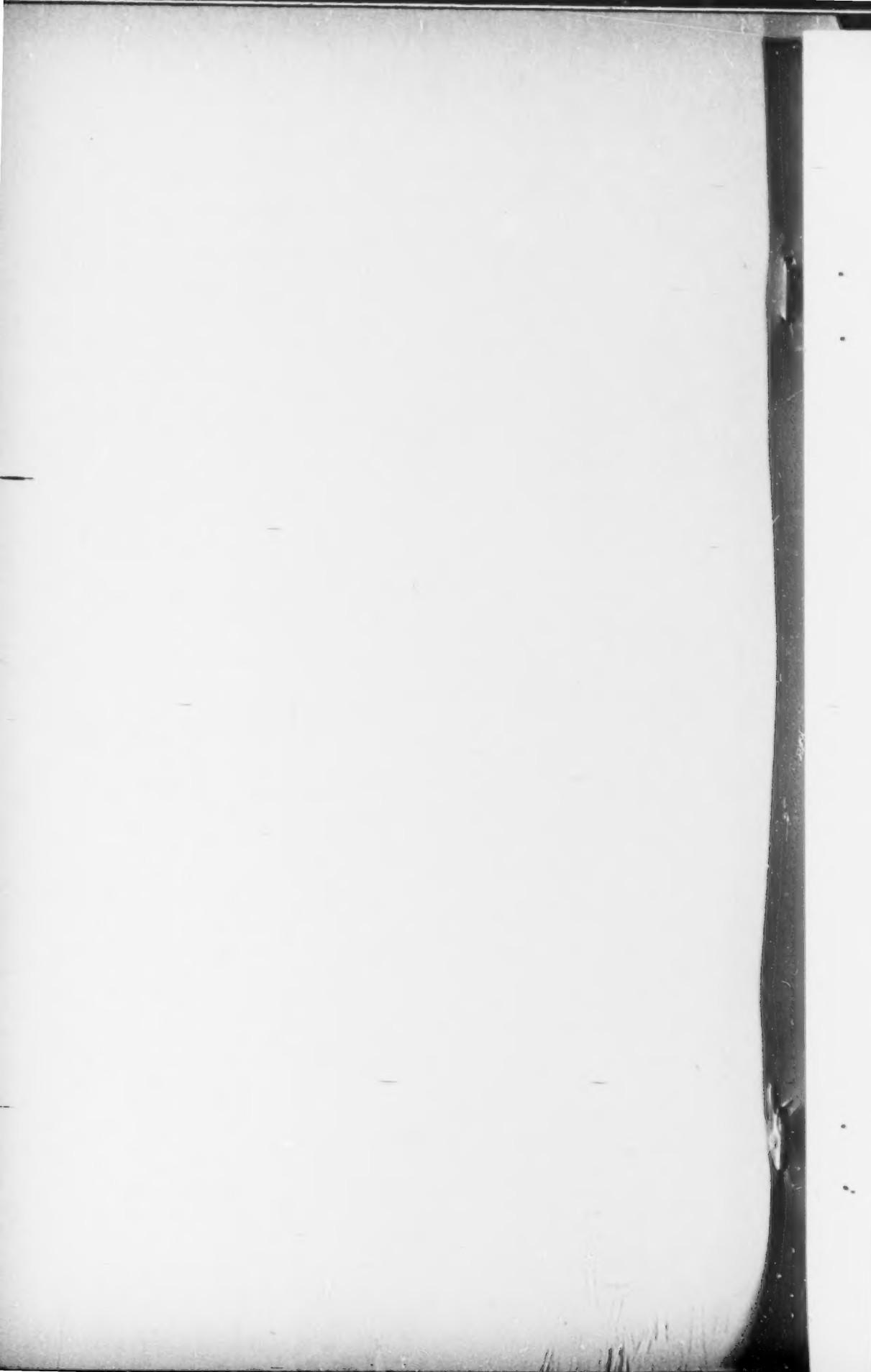
In this opinion we will discuss the individual counts and the issue of penalty and we will address the material exceptions of the respondent as they relate to those issues. Generally speaking, the respondent's exceptions to the recommended decision have not assisted the Board in conducting its analysis of the recommended decision. Those exceptions were contained in a rambling, 840-page filing which rarely addressed specific findings or charges, and which contained a massive amount of hyperbole, but little persuasively



reasoned argumentation.² All of respondent's exceptions, except for those which relate to charge 4, are denied.³ It

²For example, on numerous occasions, the respondent referred to the administrative law judge who heard this case as the "agency co-counsel." In addition, throughout the exceptions, the respondent vilified the administrative law judge by attacking his integrity, reputation, and intelligence. Because of those and comparable excesses relating to other individuals, the respondent's filing transcends the bounds of any standard for issues presented in any section 7521 case, deserves, as the agency suggested, to be rejected out of hand.

³Respondent filed several motions to have the Board augment the record after the issuance of the recommended decision. They are also denied. One motion complained that the agency had notified respondent of his obligation to schedule 208 hours of "use or lose" leave which he had accumulated. He wished to remain on administrative leave and charged that the agency was placing him on enforced annual leave. Federal employees, however, are statutorily proscribed from accumulating annual leave in excess of 240 hours over a one-year period. 5 U.S.C. Section 6304(a). Respondent does not fall within any of the exceptions provided by that statute. The other motions addressed issues immaterial to this case.



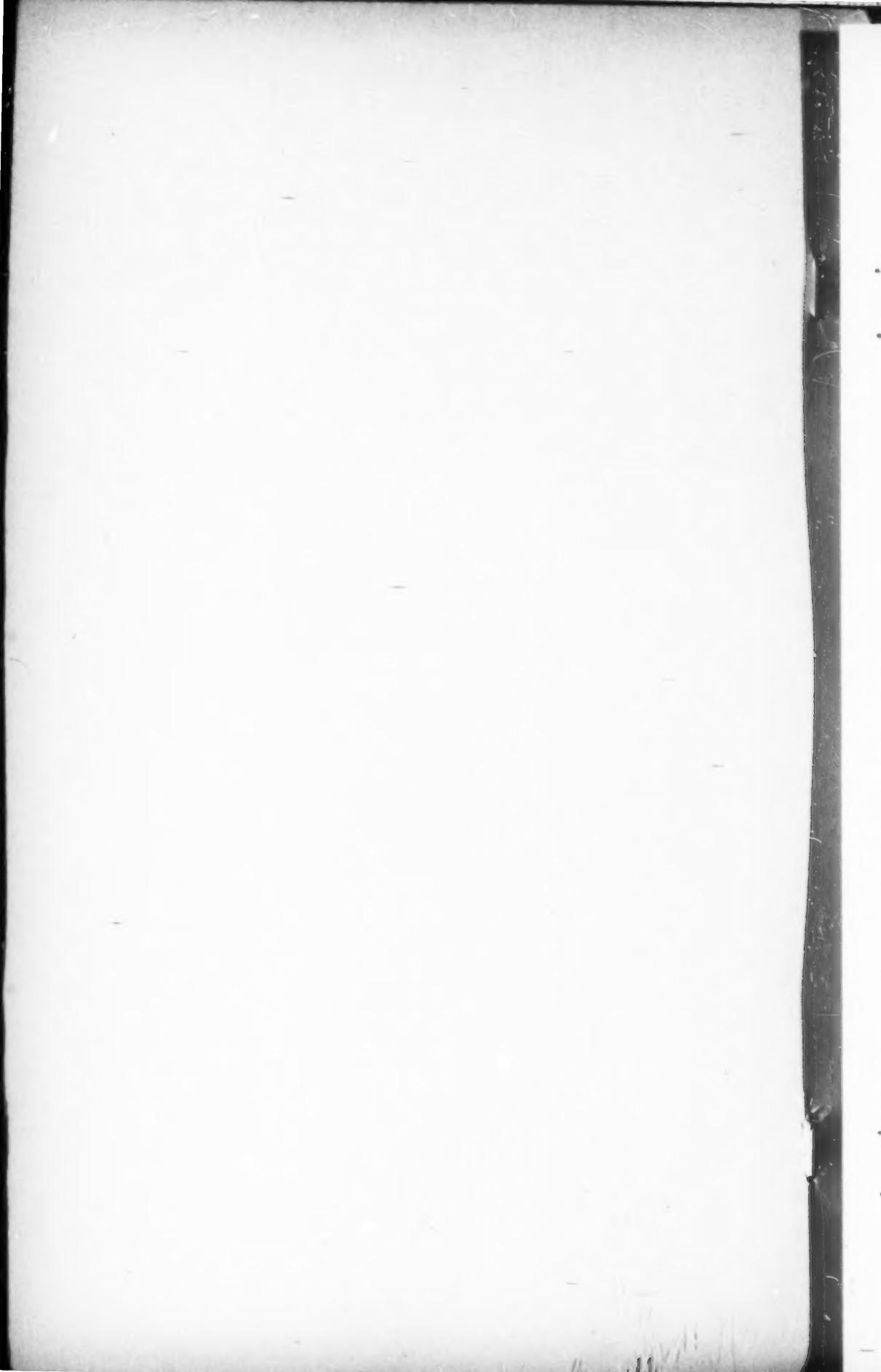
is impractical because of the sheer number of respondent's exceptions, and virtually impossible because of their logical imprecision, to state the reasons for denying each of them. Therefore, only respondent's material exceptions will be addressed in the succeeding sections of this opinion, despite the fact that all of respondent's exceptions have been considered, to the extent that they were understandable.⁴

⁴Administrative orders do not need to provide the reasons for denying each and every exception in order to comply with the provisions of 5 U.S.C. Section 557(c). See Borek Motors Sales, Inc. v. N.L.R.B., 425 F.2d 677, 681 (7th Cir.), cert. denied 400 U.S. 823 (1970). In that case, the court found that the agency's final order - which adopted a recommended decision as modified, and which discussed only some of the exceptions, while necessarily overruling the others by implication - contained sufficient rulings and analysis to meet the requirements of the Administrative Procedure Act.



Count One

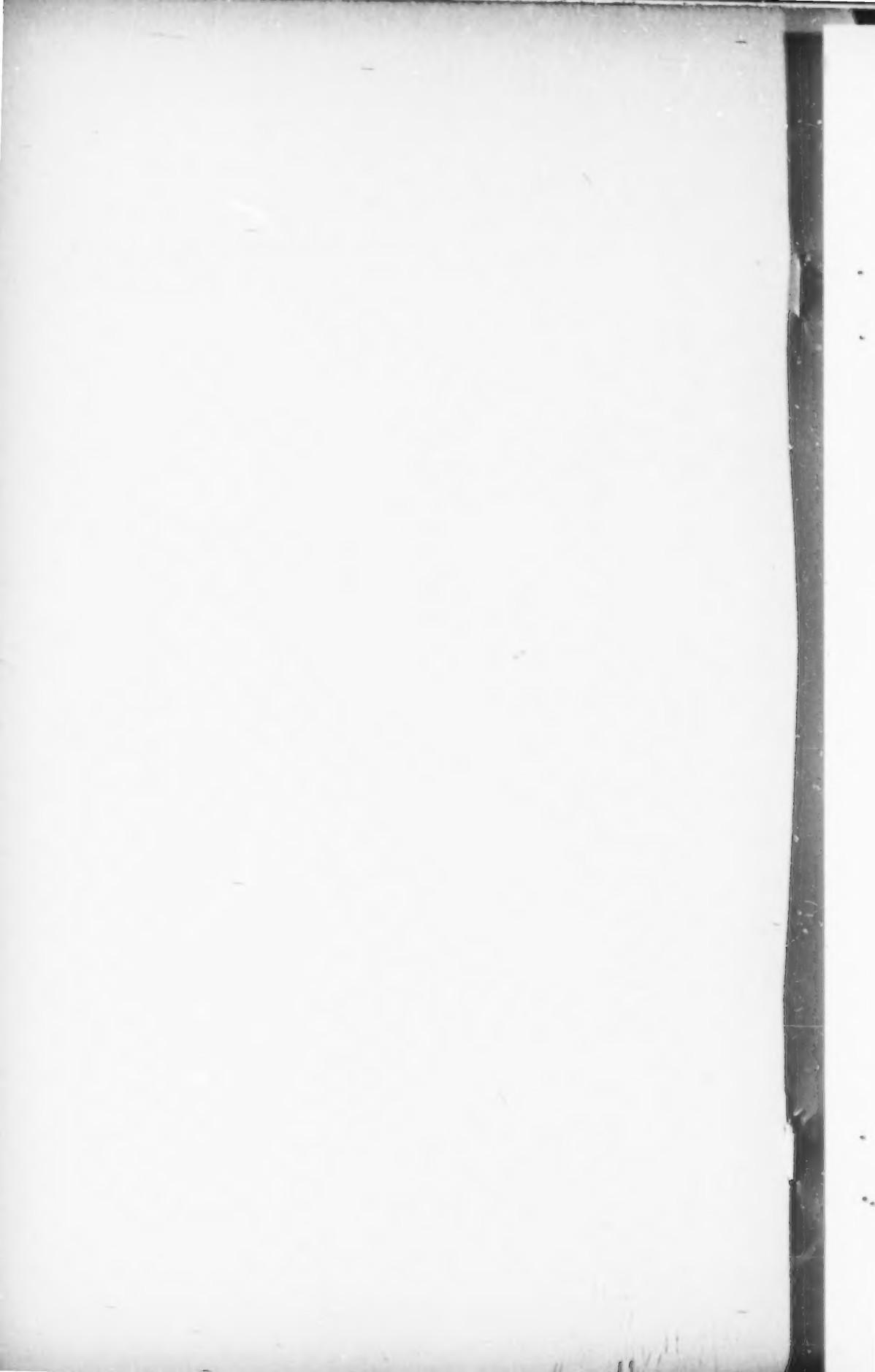
In Count One, the agency charged the respondent with "insubordination, disruption and unprofessional actions amounting to open contempt and defiance of administrative authority." The agency illustrated this charge by numerous specifications describing examples of conduct which it claimed demonstrated that defiance and contempt of administrative authority. The recommended decision found that many of those specifications were proven, that they did constitute conduct which amounted to improper defiance of administrative authority, and that such conduct constituted good cause to discipline an administrative law judge. Recommended Decision (hereafter, R.D.) at



7-12. We agree.⁵

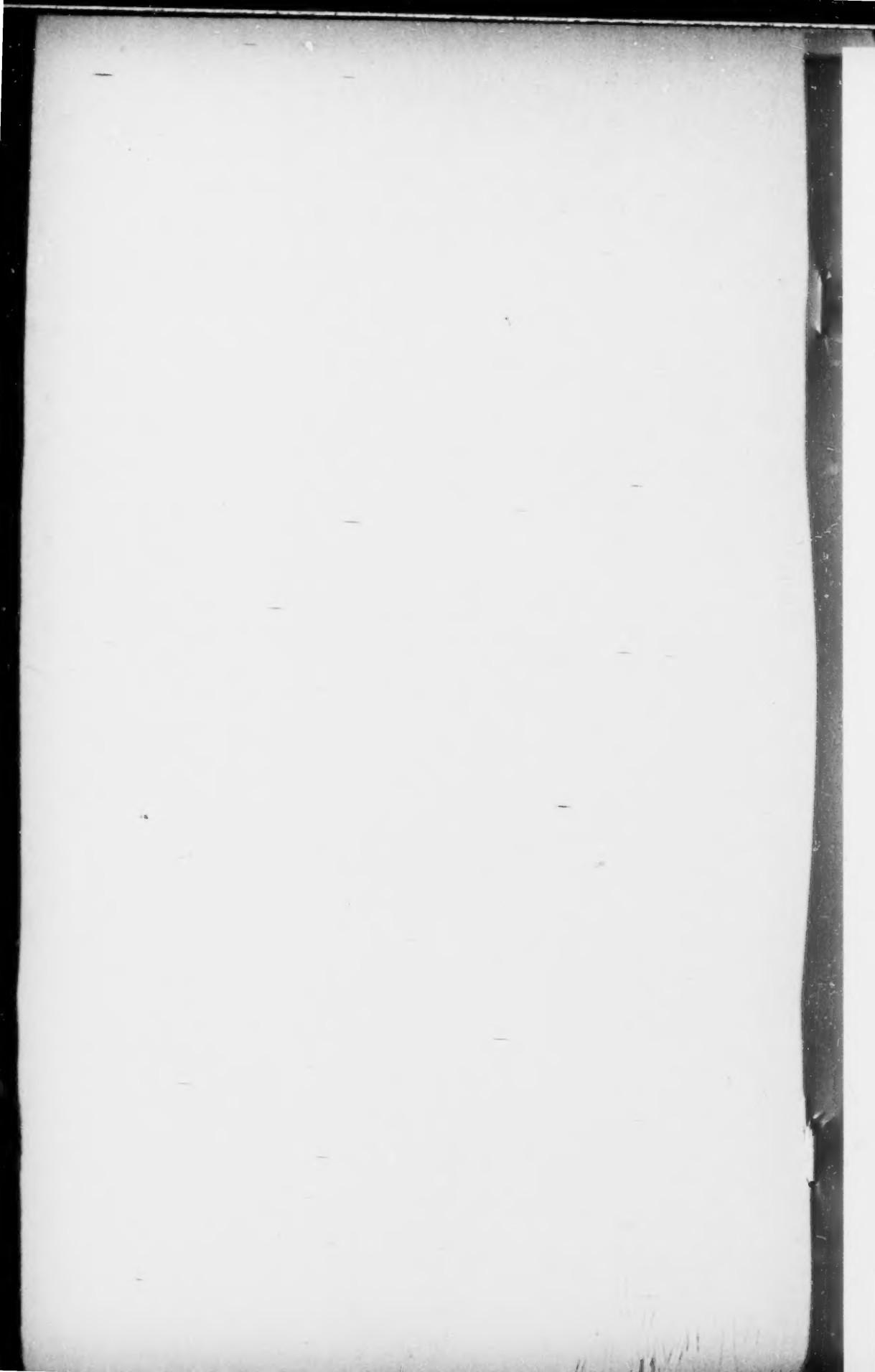
In Social Security Administration v. Goodman, 19 M.S.P.R. 321, 330 n.8 (1984), we held that the efficiency of the service standard contained in 5 U.S.C. Section 7513 is different from the good cause standard contained in section 7521, but that traditional chapter 75 cases could, where appropriate, provide

⁵The recommended decision found that some of the examples of the respondent's contemptuous and defiant behavior did not, on their own, amount to "good cause" because they were permitted by law. R.D. at 13 and 18. An example of that kind of behavior is the respondent's filing of theft-of-money charges against his supervisor with the local police. We have no need to, and have not been asked by the agency to, reconsider those partial rulings. However, were they decisionally significant, we would revisit those holdings since they imply that an act which is lawful cannot also be impermissible contemptuous or defiant. That is a position with which we do not agree and, in fact, with regard to the second count, we will be holding that good cause under section 7521 can be rooted in an administrative Law judge's lawful but abusive use of a regulatory right to file grievances.



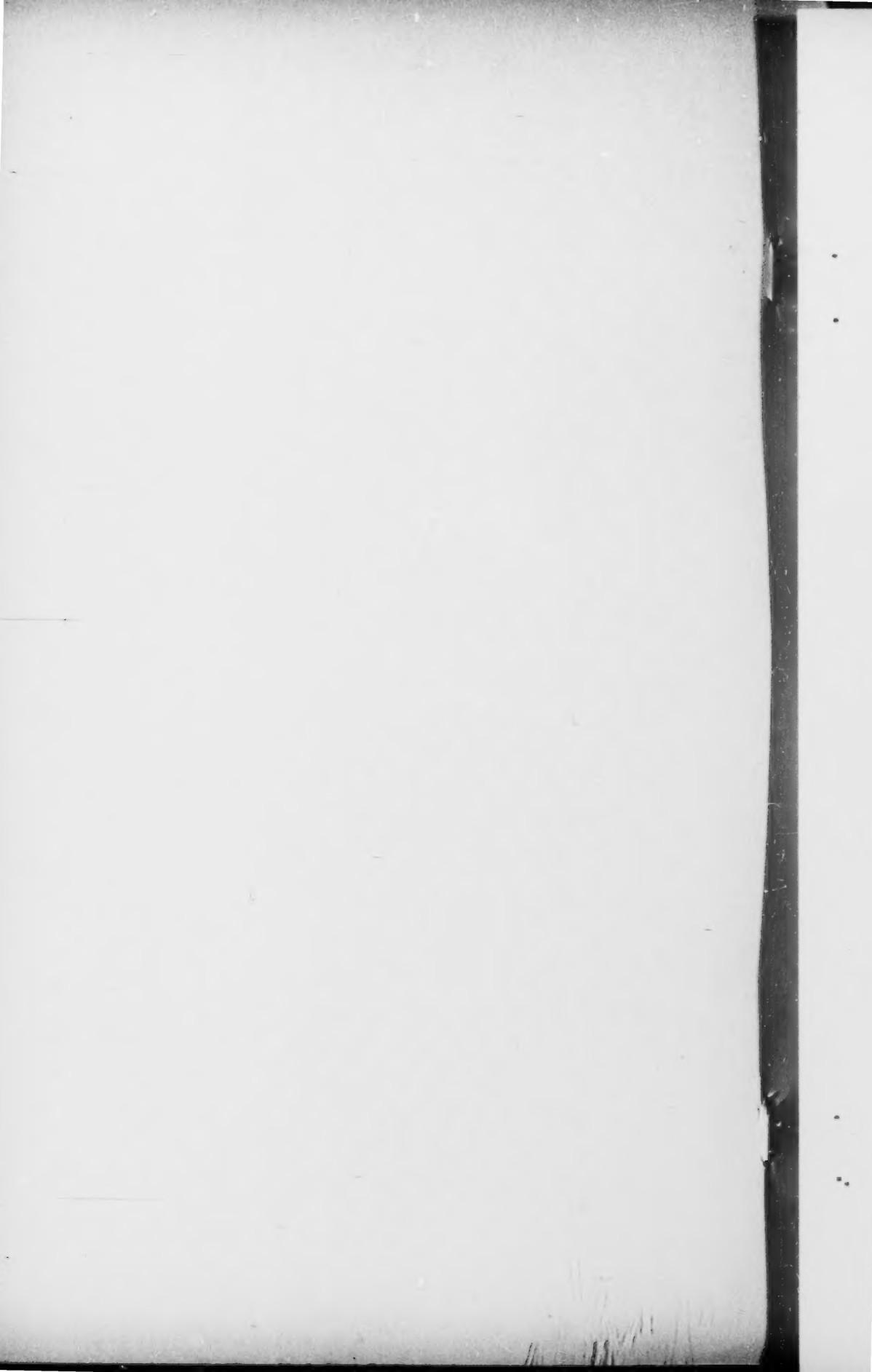
guidance in interpreting the meaning of "good cause" in cases brought against administrative law judges. Conduct of the same nature as that described in this count has been held to violate the efficiency of the service standard. Count One contains charges of insubordinate and disruptive behavior amounting to an insolent disrespect toward supervisors. Because of the obvious effect on the workplace of conduct which is inspired by such an attitude, an insolent disrespect toward authority, manifested through insubordinate and disruptive behavior, has traditionally been seen as a proper basis for removing an employee under the efficiency of the service standard. Jefferson v. Veterans Administration, 6 M.S.P.R. 348, 352 (1981).

In addition, there is no doubt that



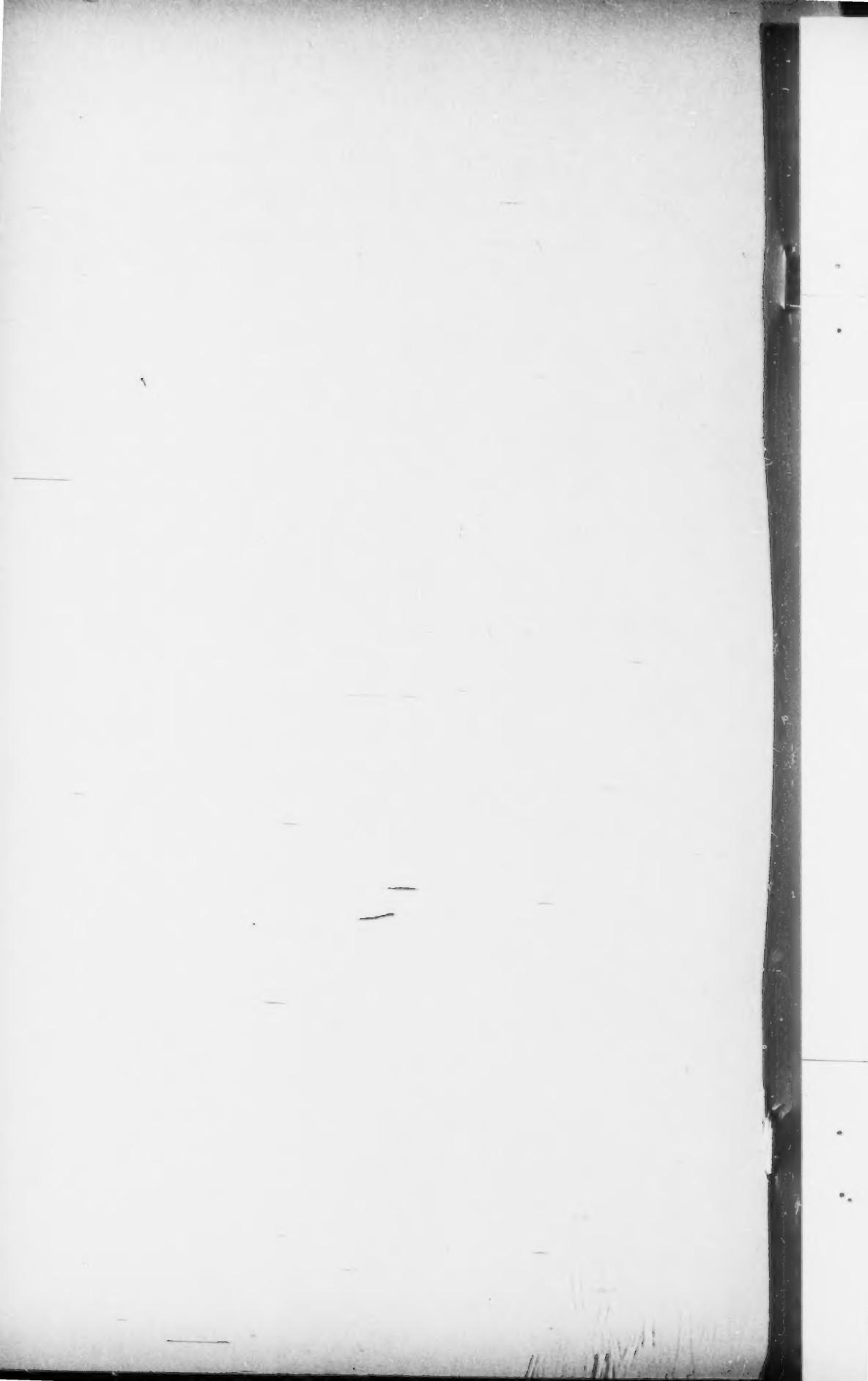
the type of conduct which this respondent engaged in -- conduct which amounted to insolent disrespect for supervisors -- is so distasteful and intolerable in the workplace that it should also be held to violate the good cause standard. However, in examining the charge contained in this count, we must also be careful to insure that our analysis does not undercut the important protections enacted by Congress to insure the independence of administrative law judges.

In order to effectuate those protections, we have in the past determined that the rules governing insubordinate and disrespectfully behavior by administrative law judges are not identical with those governing such behavior by other federal employees. Therefore, while we have allowed

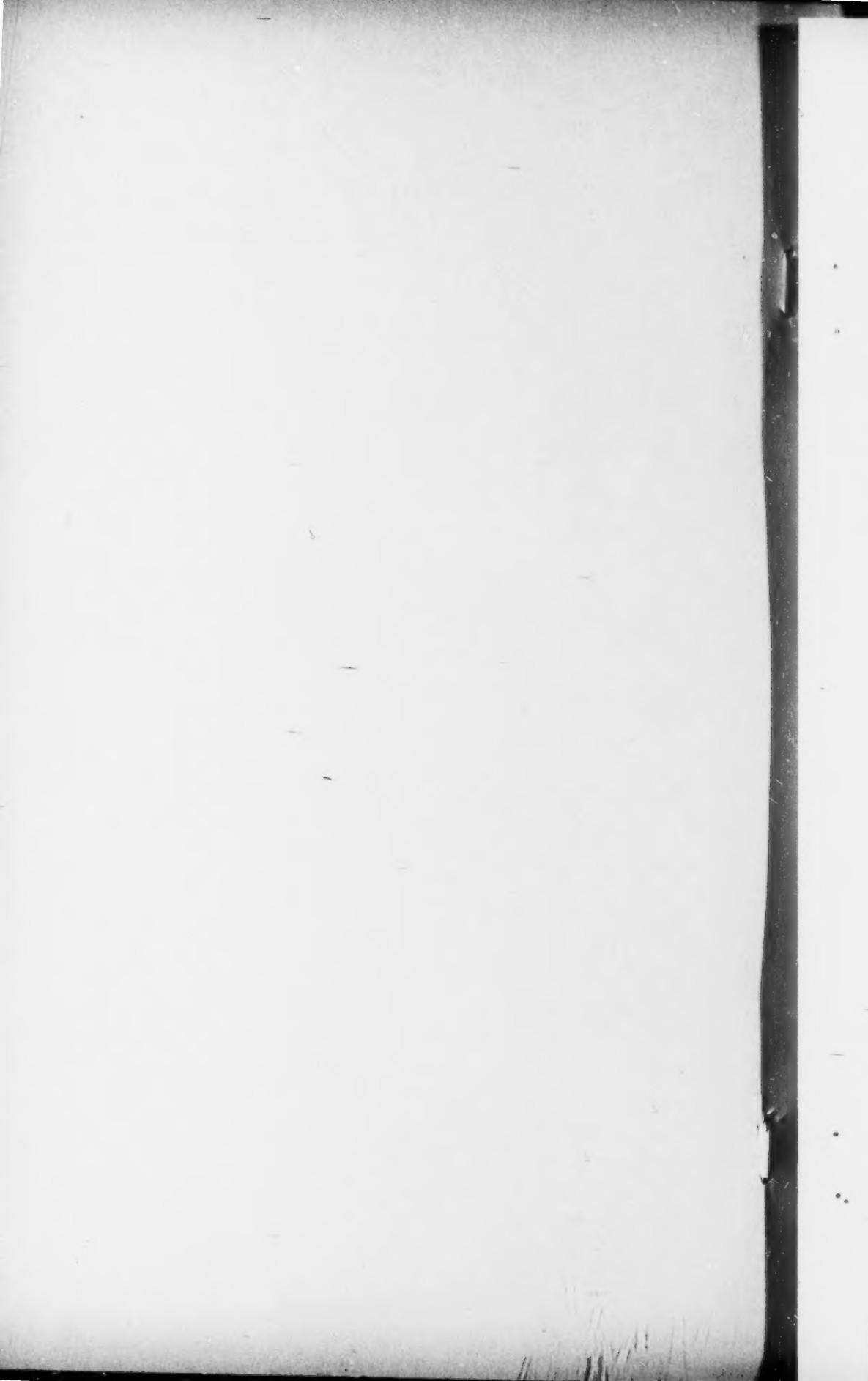


administrative law judges to be disciplined for failing to follow instructions, we have also held that they cannot be disciplined for failing to comply with instructions which constitute an improper interference with their adjudicative functions. Social Security Administration v. Manion, 19 M.S.P.R. 298, aff'd, 746 F.2d 1491 (Fed. Cir. 1984) (table), second appeal docketed, No. 88-3050 (Fed. Cir. Nov. 17, 1987).

Similarly, while we have ruled that administrative law judges can be disciplined for disrespectful behavior, we have been unwilling to do so unless their employing agencies can actually establish that the disrespectful behavior meaningfully impaired the supervisory relationship between the respondents and their supervisors. Social Security Administration v. Brennan, 27 M.S.P.R.



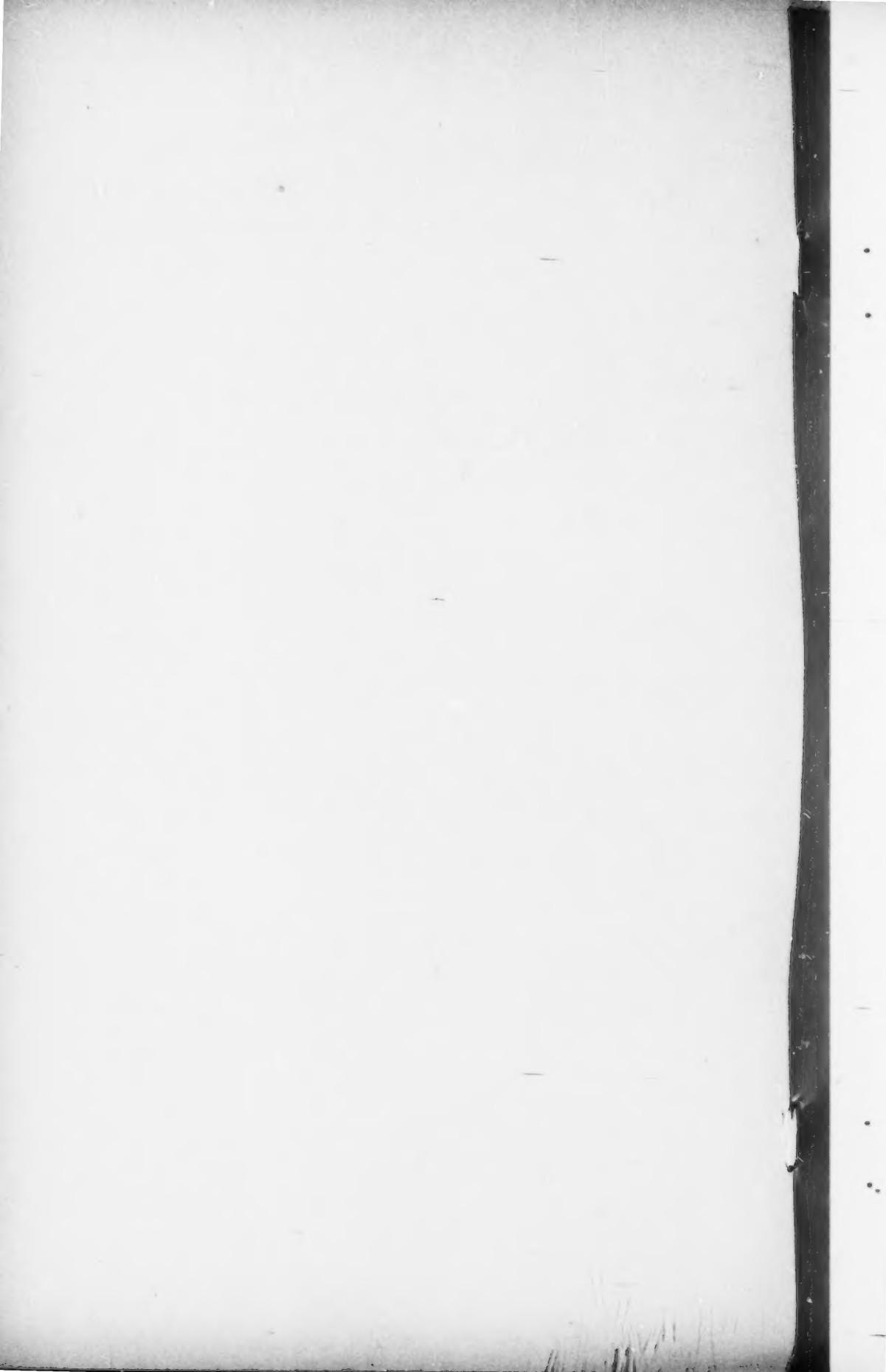
242 (1985). Disrespect normally goes to the heart of the efficiency of the service standard because it affects the supervisor's ability to maintain workplace discipline. However, the same effect cannot be presumed with regard to the disrespectful conduct of administrative law judges, because they and their supervisors perform their adjudicatory functions independently of each other. Since the supervisory role of an Administrative Law Judge In Charge ("ALJIC") is largely limited to administrative matters, we required, in Brennan, proof of an adverse effect and were unwilling to draw an inference that an ALJ's disrespectful behavior necessarily had a sufficiently disruptive effect on that relationship to constitute good cause for discipline under section 7521.



Therefore, in reviewing the record in this case, we must insure that the insubordination charges did not relate to instructions which constituted improper interference with the respondent's quasi-judicial functions and that the agency established that respondent's disrespectful conduct actually had an adverse operational effect.

Respondent was clearly insubordinate. For example, ostensibly because of a minor travel reimbursement dispute, Judge Burris refused, over two multi-month periods, to schedule any hearings that required travel. See Complainant's Exhibit No. 20 (Ex. C-20), vol. I, pp. 232-33, 290.⁶ We have previously held that such behavior

⁶In citations to exhibits throughout this opinion, "Ex." refers to exhibit, "C" stands for Complainant's, and "R" stands for Respondent's.



violates the good cause standard. In Manion we said, "[A]gencies must have the power to discipline an ALJ for an insubordinate and unreasonable refusal to carry out his primary function of hearing and deciding cases." 19 M.S.P.R. at 303.

The respondent did not establish that he agency's requirements regarding the scheduling of cases in any way interfered with his decisional independence, and we agree with the findings contained in the recommended decision that no reasonable excuse existed for the respondent's behavior. The record also reveals that the respondent insubordinately refused, without any justifiable excuse, to follow other administrative instructions, relating to processing travel vouchers and distributing travel itineraries, which similarly did not improperly



intrude on his adjudicatory functions. Transcripts (hereafter, Tr.) vol. I, pp. 188-96.

In addition, the agency established that the respondent's insubordinate and disrespectful conduct, the start of which coincide with his being replaced as the Acting ALJIC of his office, significantly impaired that office's operations. Moreover, we find that the behavior complained of in this count was the product of respondent's resentful intent to "get even," by disrupting the operation of the office, for having been replaced as ALJIC by his current supervisor. Ex. C-20 vol. I, pp. 207, 294, 307; vol. II, pp. 113, 220.⁷

⁷This particular holding, which Burris's deposition supports, is also implicitly contained in the recommended decision, which contains the following statement: "the record evidence makes perfectly clear [that] these personnel changes . . . sparked resentment in

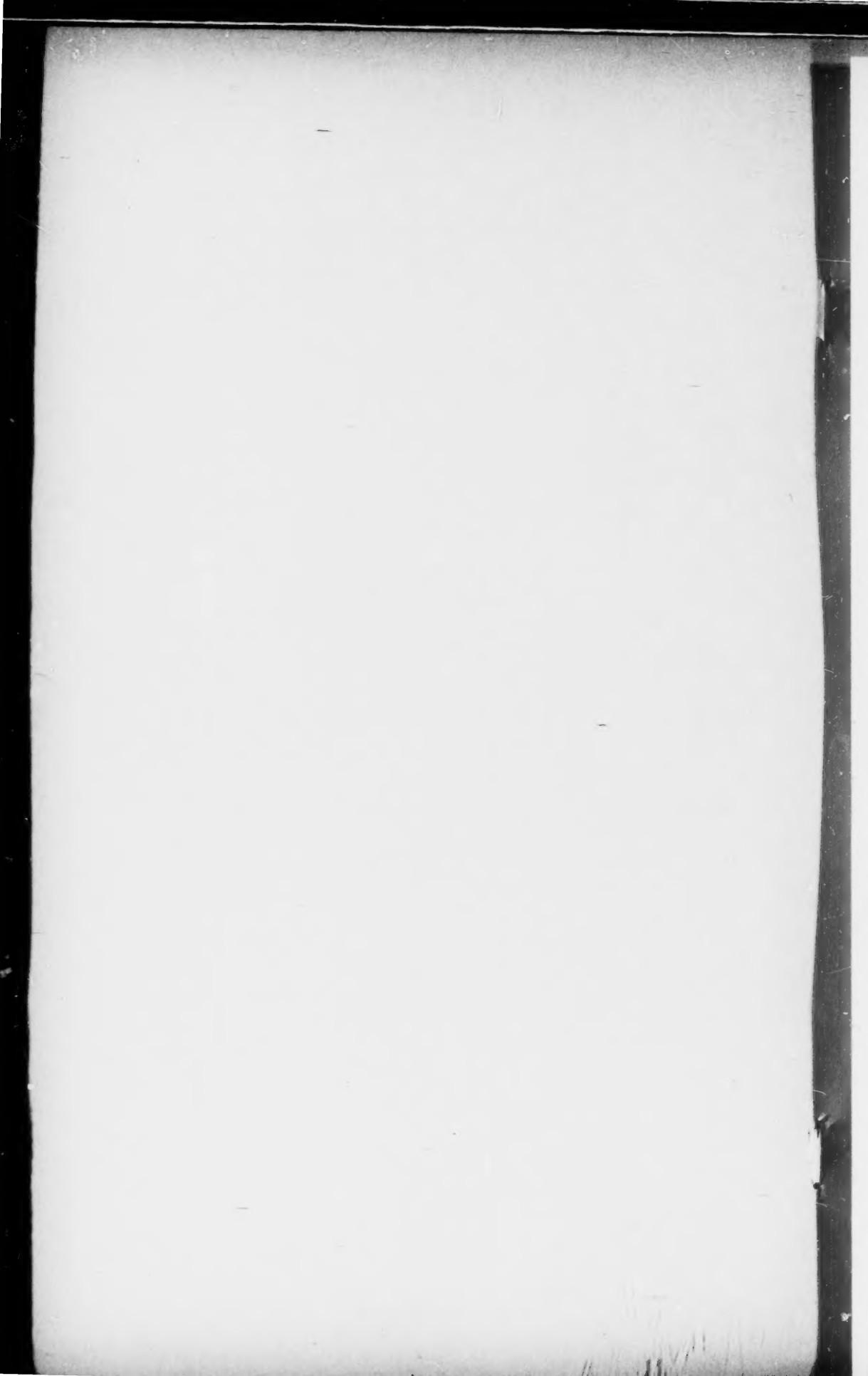


There is no question that respondent's insistence on performing non-adjudicative tasks in ways which were contrary to established office procedures confounded support staff employees and caused disorganization, delays and disruption. R.D. at 12-13. Moreover, those disruptive effects were the intended consequences of respondent's consistent attempts to undermine his supervisor's authority by countermanaging his instructions (Ex. C-2), by ridiculing him, directly and in conversations with other employees, and by unreasonably refusing to deal directly with him. See Ex. C-1.

Therefore, when the evidence is examined against the necessary analytical

Burris . . . [particularly since his] removal as Acting ALJIC was due to dissatisfaction with his stewardship." Recommended Decision at 4 - 5.

APPENDIX B 000019



framework, the correctness of the recommended decision's conclusion with regard to Count One is confirmed.

Count Two

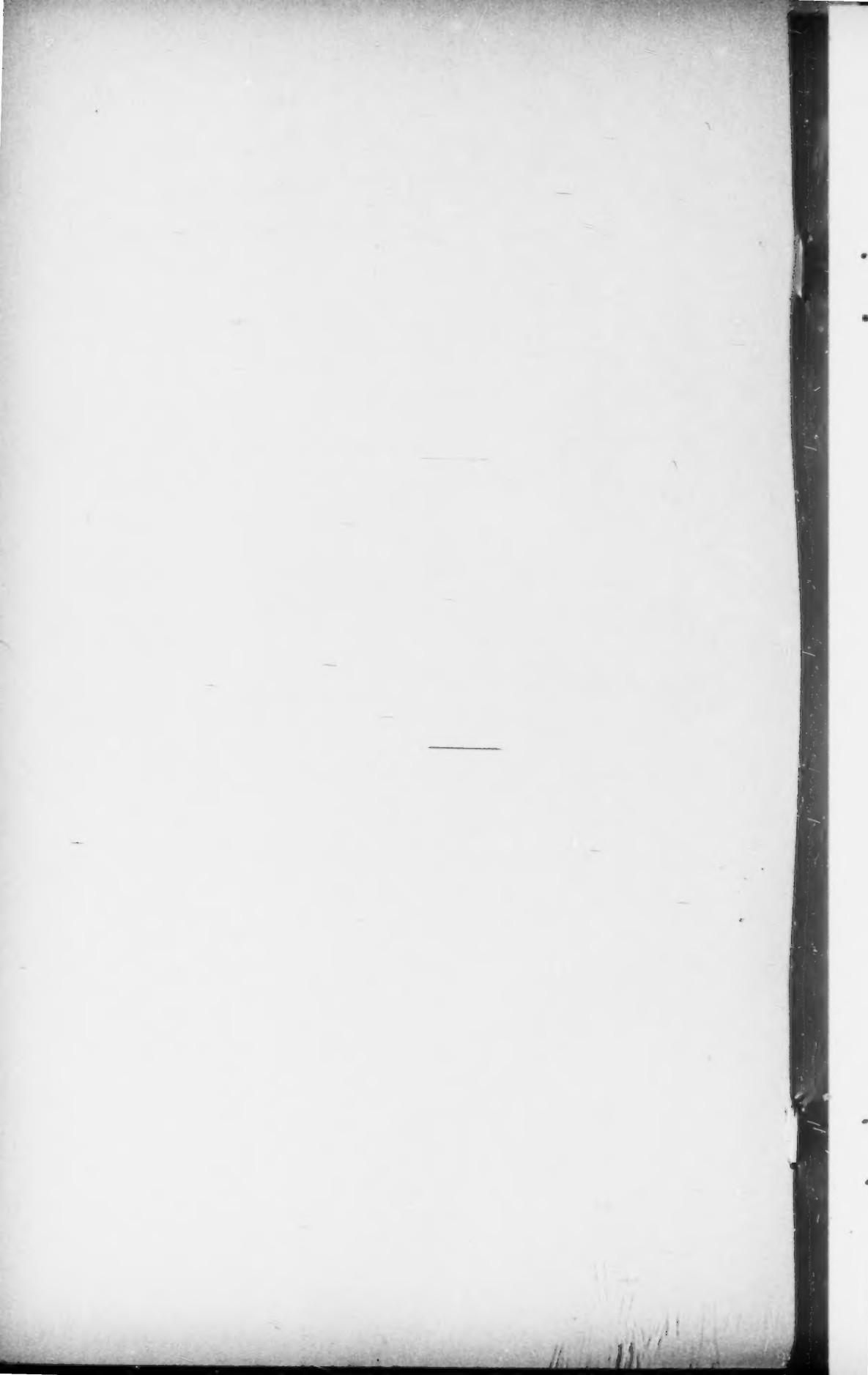
In Count Two, the agency charged the respondent with "malicious use of the HHS grievance procedures." It charged that the respondent filed an inordinate number of ill-founded grievances which harassed the agency, and that he did so in order to make outrageously vituperative attacks against his supervisors and other management officials. The recommended decision found that the respondent's numerous and lengthy grievance filings did harass agency officials and that the grievances were filed for the purpose of harassment and to provide the respondent with a forum for articulating abusive statements about agency officials. R.D. at 21-22. The recommended decision then



concluded that such conduct constituted good cause for disciplining an administrative law judge. R.D. at 23.
We agree.

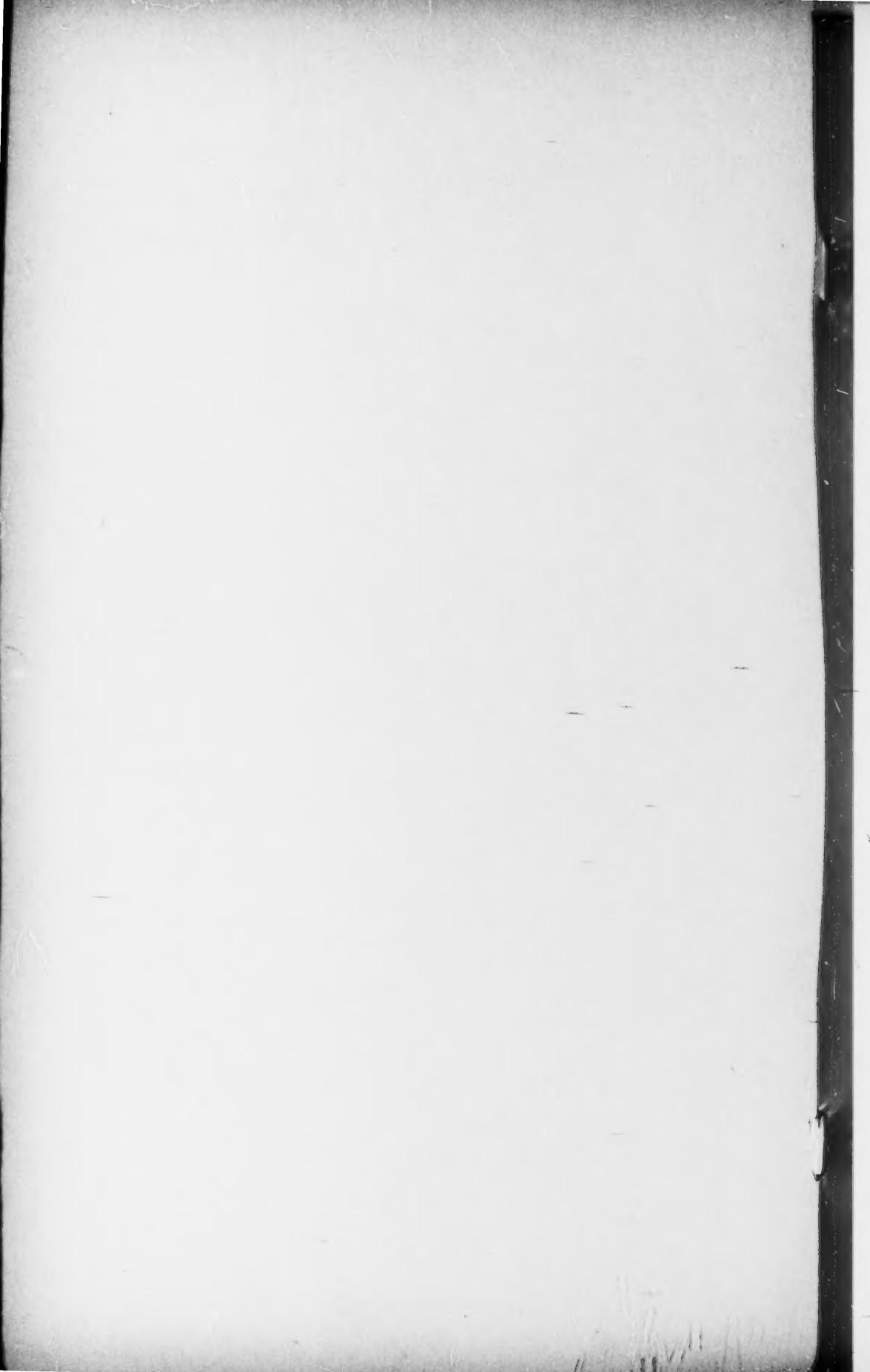
We note that only in the most extraordinary case will statements made in grievances, or the filing of grievances, be found to constitute a proper basis for disciplining an employee. In fact, we have previously observed that "[t]he case law in this areas is clear that, in [the] absence of gross insubordination or threats of physical harm, an employee may generally not be discharged for rude or impertinent conduct in the course of presenting grievances." Kennedy v. Department of Army, 22 M.S.P.R. 190, 194 (1984).

The law in this area is protective of the grievant's rights because, under 5 U.S.C. Section 2302(b)(9), a section



which has consistently been interpreted to apply to the filing of grievances, it is a prohibited personnel practice to retaliate against an employee for the exercise of an appeal right. See Bondinus v. Department of the Treasury, 7 M.S.P.R. 536, 539 (1981). In addition, the law is protective of those rights in order to insure the efficacy of appeals processes created in furtherance of the public interest. Special Counsel v. Harvey, 28 M.S.P.R. 595, 606 (1984), rev'd on other grounds, 802 F.2d 537 (D.C. Cir. 1986).

However, the protections afforded to the filing of grievances and to statements made within them are not absolute. We have found that where there has been abusive behavior during grievance hearings and where actions have been taken in bad faith, an employee may



be disciplined for grievance-related conduct under the efficiency of the service standard. Farris v. U.S. Postal Service, 14 M.S.P.R 568 (1983). We now find that an administrative law judge may also be disciplined under the good cause standard on the basis of the type of grievance-system abuses revealed by the record in this case.

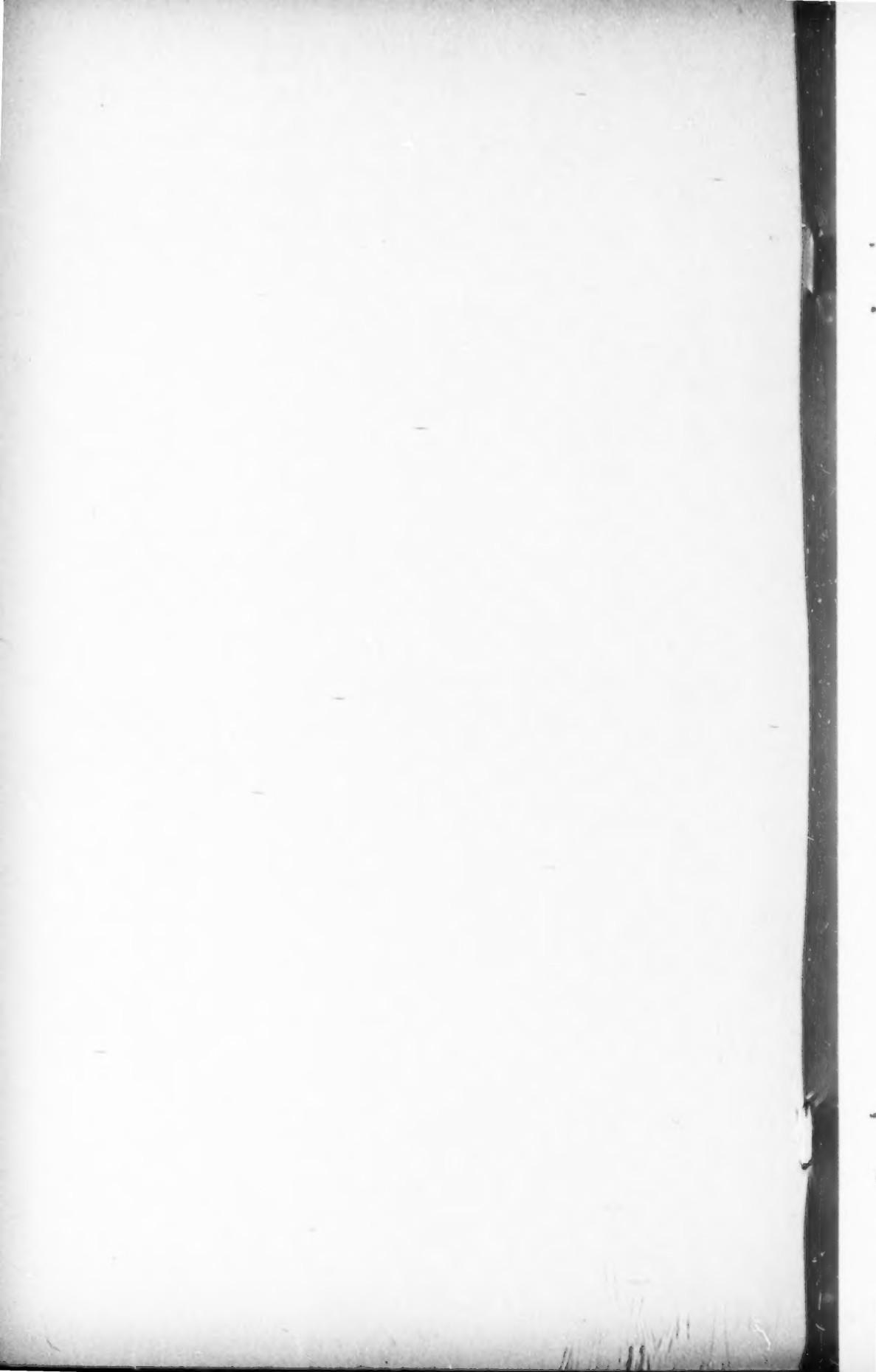
During the 26 months following the respondent's replacement as acting ALJIC, he filed approximately 100 grievances, totaling more than 2000 pages. These massive filings placed a heavy burden on those responsible for processing his grievances. R.D. at 20. This burden was unreasonable because the respondent filed frivolous grievances and grievances on matters for which, even if valid, he sought no personal relief. See Ex. C-21. Rather than seeking to obtain redress,



the respondent used the grievance system as an additional route for "getting even" with those people he held responsible for removing him from the acting ALJIC position he temporarily occupied. R.D. at 21.

Moreover, the respondent repeatedly insulted the integrity, intelligence and character of his supervisors and management officials in those grievances. Ex. C-22 *passim*. In fact, we are persuaded that the respondent filed these grievances in order to obtain a forum in which to cast aspersions and make derogatory comments.

The multitude of ill-founded grievances and the excesses contained in them reflect that the appellant's motives were to insult and harass others. Under the circumstances presented here, we find that the agency has established that

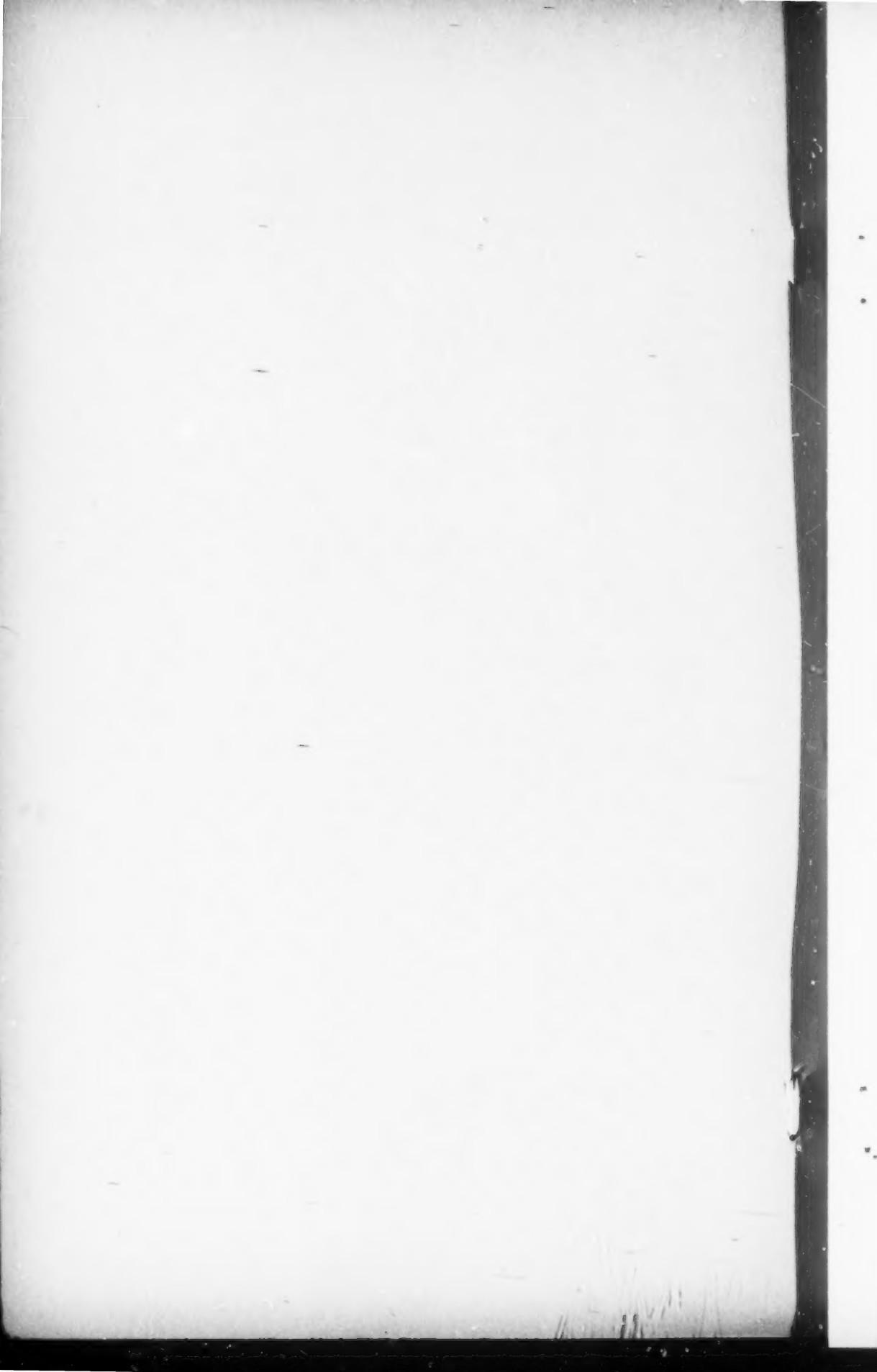


respondent committed outrageous and sufficiently flagrant abuses of the grievance process to warrant the imposition of discipline under the good cause standard.

The respondent contends that discipline cannot be imposed upon him for what he said in the grievances because the agency did not establish, or even attempt to establish, that his insulting comments were untrue. In making this argument, however, the respondent misunderstands the nature of that portion of the charge which relates to his use of abusive language. The truth or falsity of his outlandish characterizations was not at issue. The agency did not ask permission to discipline the respondent for lying, and thus did not need to establish that he was.

Instead, the agency sought

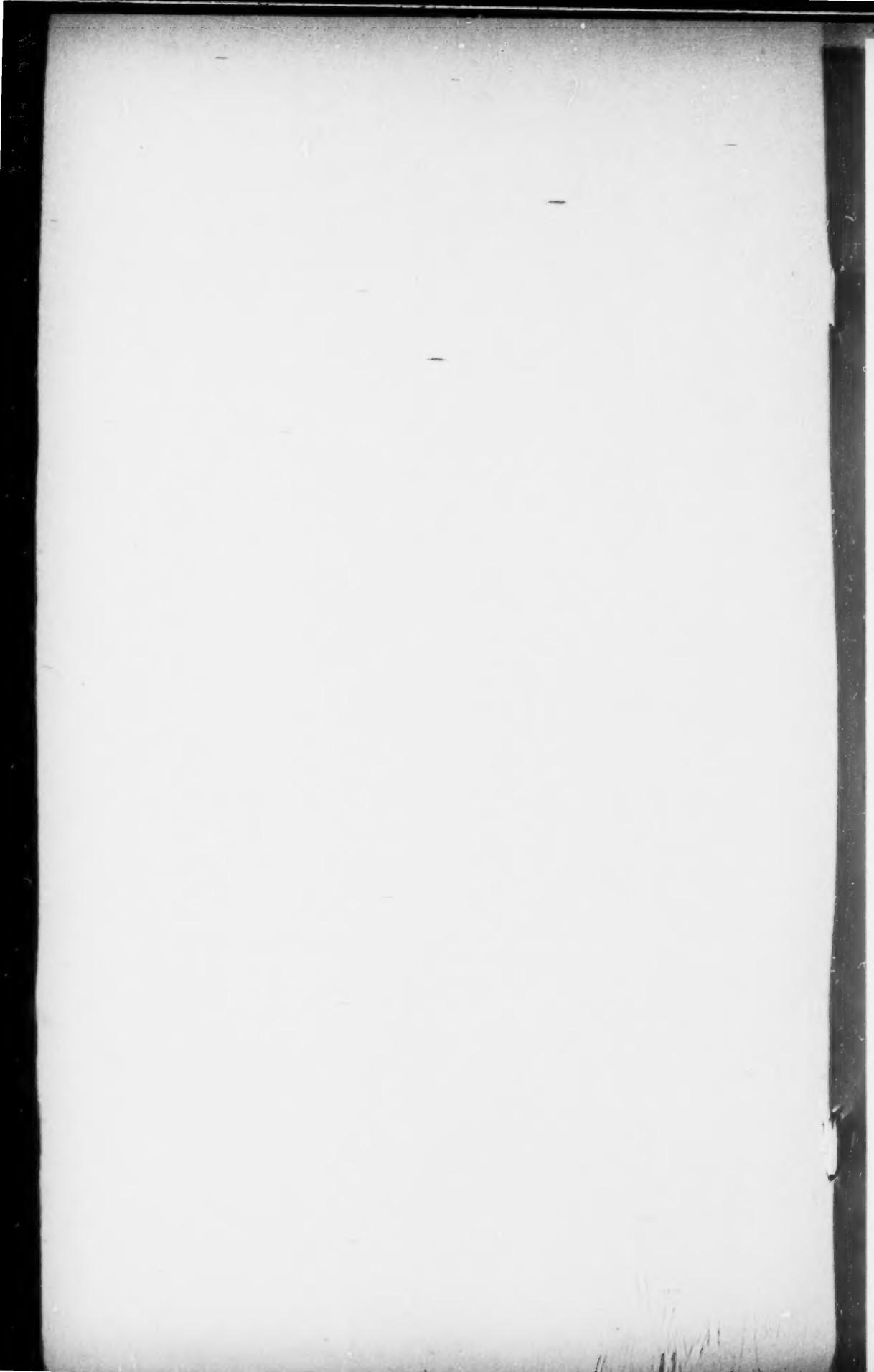
APPENDIX B 000025



permission to discipline respondent for misusing the grievance system. And, in that regard, the agency had to, and did, establish that the respondent improperly used the system as a forum for hurling invectives rather than, as the regulations intended, a forum for obtaining personal relief in the form of specific remedies which would directly benefit him. 5 C.F.R. Section 771.202.

Count Three

In Count Three, the respondent is charged with insubordination for refusing to follow a written instruction issued to him on January 8, 1985, by the agency's Chief Administrative Law Judge. In reprimanding the respondent for his intemperate use of abusive language, the Chief Administrative Law Judge wrote, "I direct you not to use such intemperate language in the future ion your



communications to and about your administrative supervisors." The recommended decision found that, despite that direction, the respondent continued to describe his supervisors as liars, thieves, wimps, morons, and gangsters in official correspondence, and that his insubordinate behavior constituted good cause to discipline the respondent. R.D. at 24. We agree.

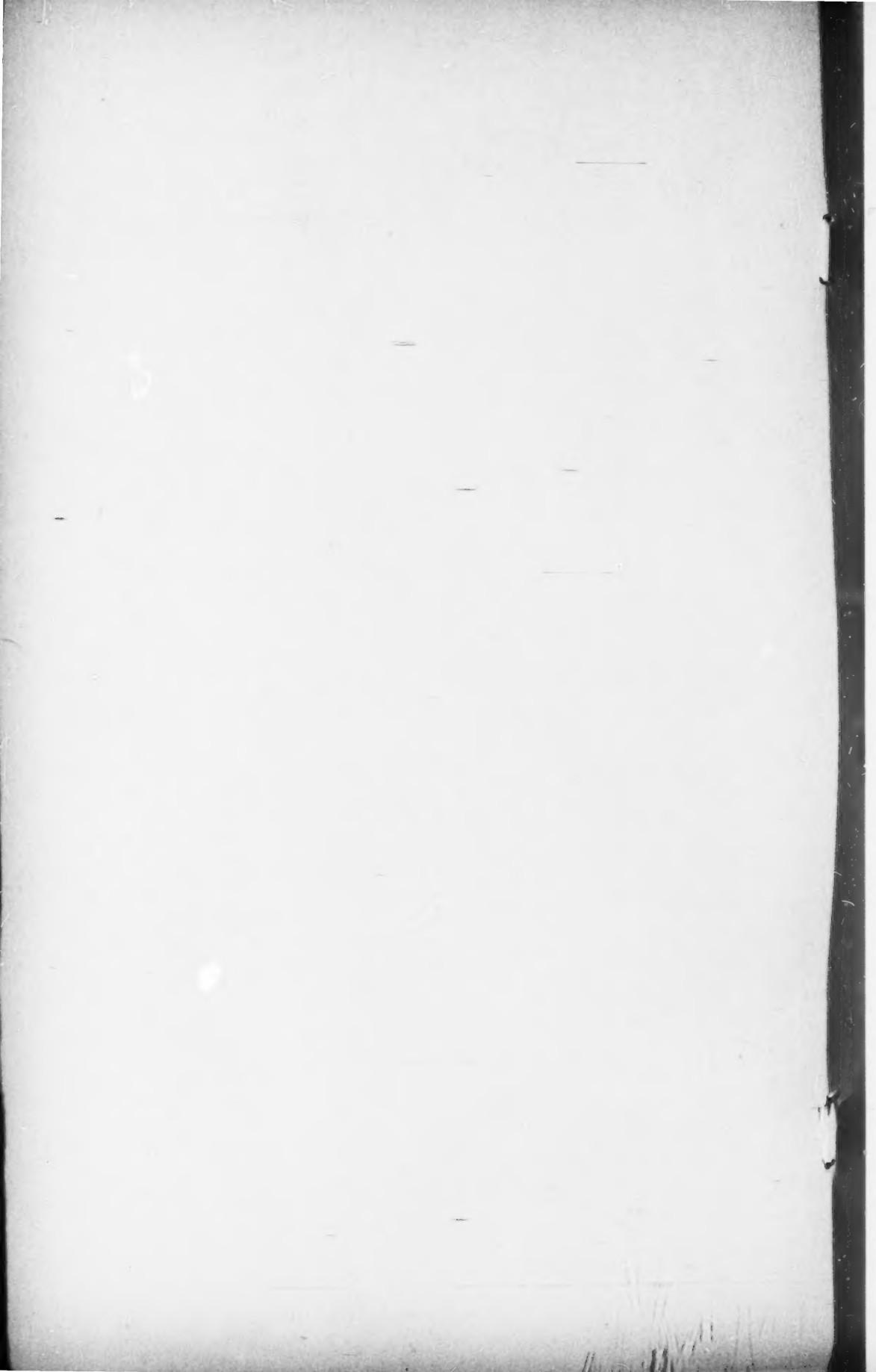
An administrative law judge can be disciplined for rude and inconsiderate behavior which, like respondent's, violates generally accepted rules of conduct. In re Glover, 1 M.S.P.R. 660, 663 (1979), we allowed an administrative law judge who had been unacceptably rude and inconsiderate to be disciplined and held that the "proper performance of government business requires that employees treat each other with a minimum



degree of courtesy in their daily contacts." Since the respondent could be disciplined for his objectionable behavior, the agency was clearly entitled to direct the respondent to refrain from continuing to use such abusive language.⁸

Moreover, even if the underlying conduct was not actionable, an administrative law judge places himself at risk by choosing to ignore a reasonable directive aimed at eliminating unreasonable behavior from the work place. As we held in Social Security Administration v. Brennan, 19 M.S.P.R. 335, 340 (1984), an administrative law

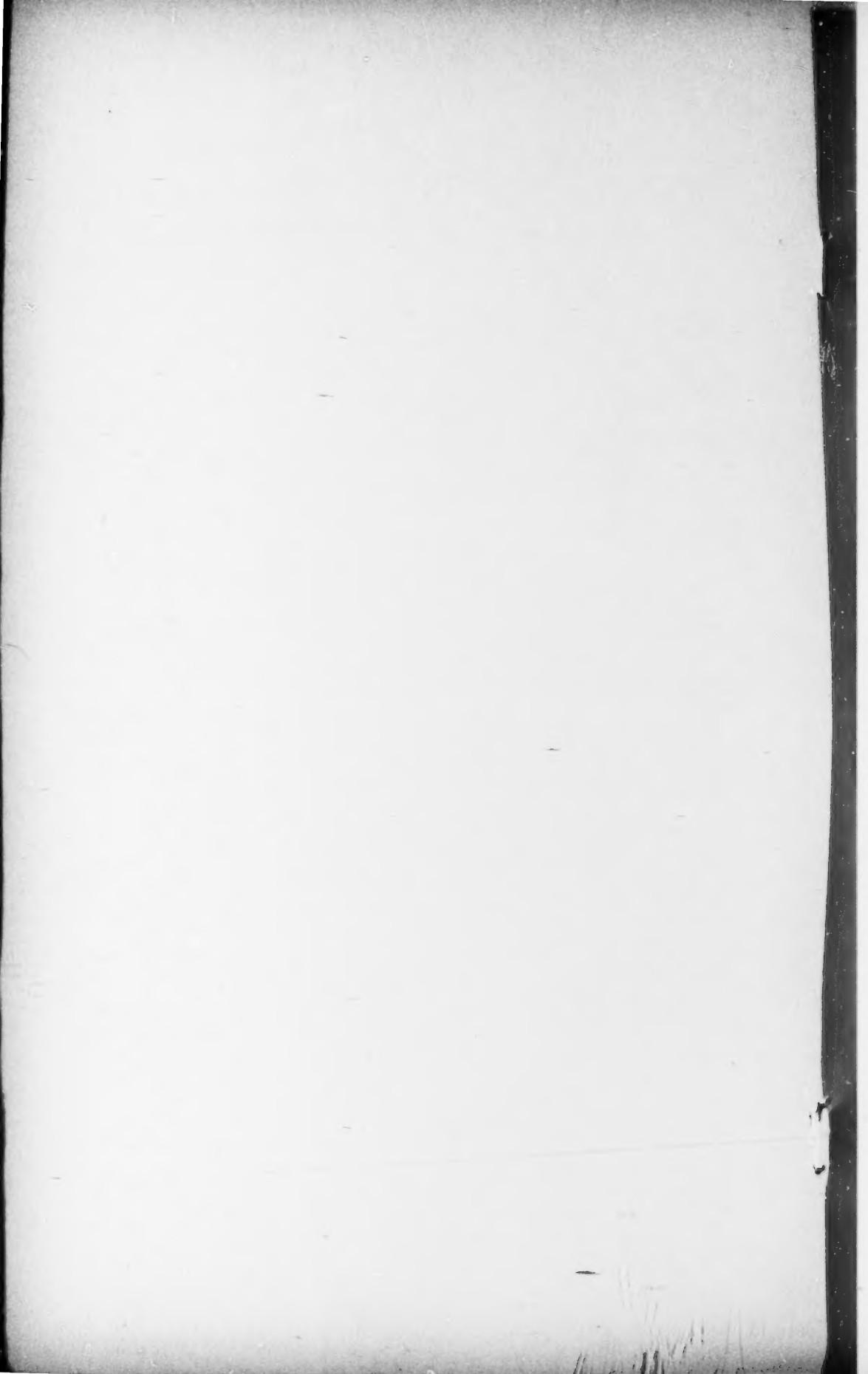
⁸Even if we interpreted this directive as relating, in part, to the respondent's use of language in grievances, we would still conclude that the directive was advising the respondent to desist from actionable behavior. This is so because we found, in Count Two, that the respondent was abusing the grievance process in order to obtain an additional forum in which to improperly inveigh against his supervisors.



judge's qualified independence "does not provide immunity from appropriate supervision." Where a management need exists to impose reasonable requirements which would not affect an ALJ's ability to provide full and fair hearings and to render impartial and complete decisions, we have held that an ALJ would not be justified in refusing to comply with such instructions.

Here, the reasonable management need was clear, and the request's impact upon the respondent's performance of adjudicatory duties was non-existent. Therefore, the respondent's insubordinate refusal to comply with the Chief Administrative Law Judge's directive constitutes good cause to authorize the imposition of punishment in this case.⁹

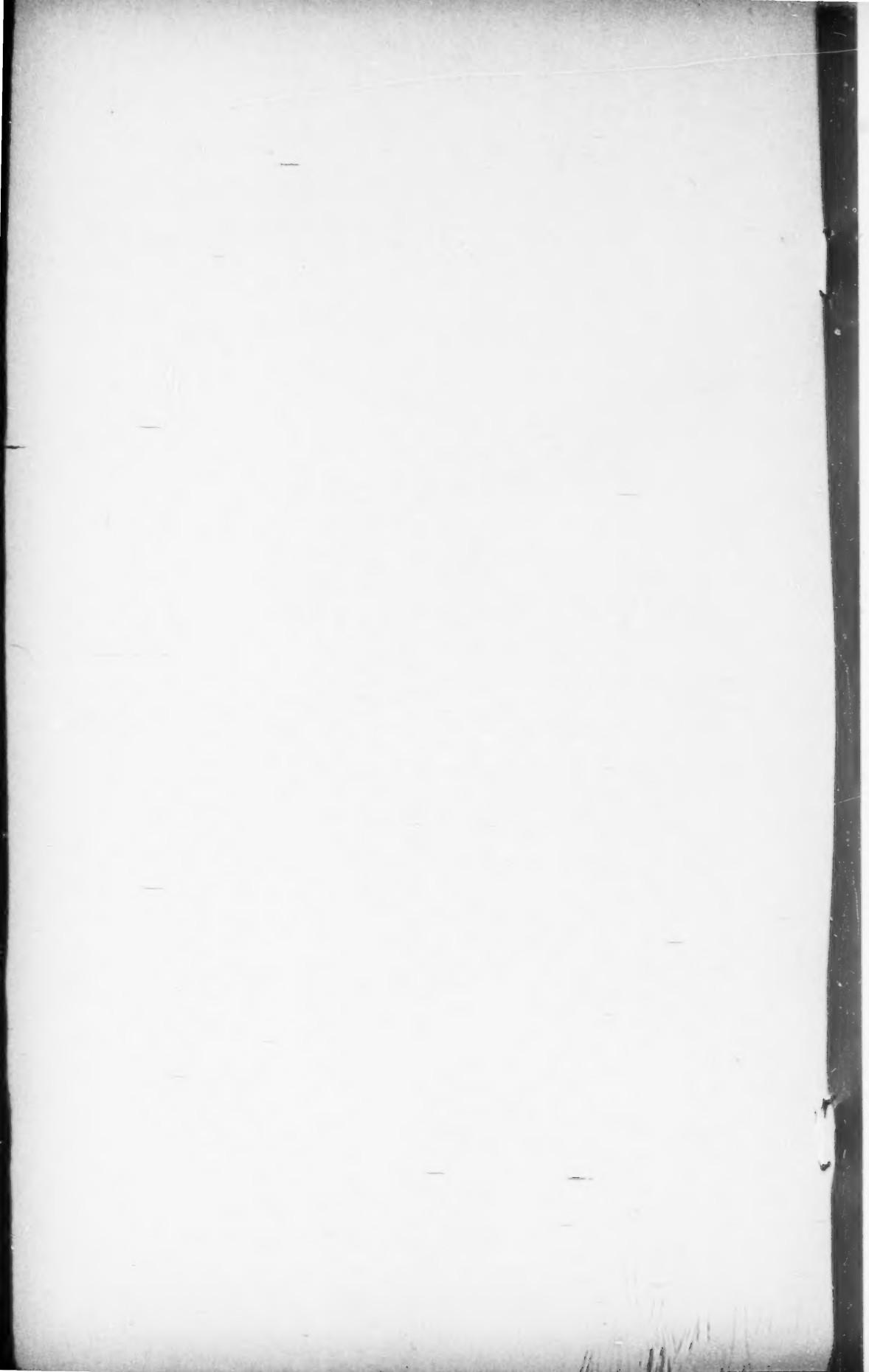
⁹The charge in this count relates only to the appellant's refusal to desist from continuing in his objectionable



Count Four

In Count Four, the respondent is charged with another act of insubordination which relates to a different portion of the written reprimand he received from the Chief Administrative Law Judge on January 8, 1985. In that portion, the respondent was reprimanded for criticizing the motives of the Social Security Administration and for basing decisions upon his belief that the Social Security Administration and for basing decisions

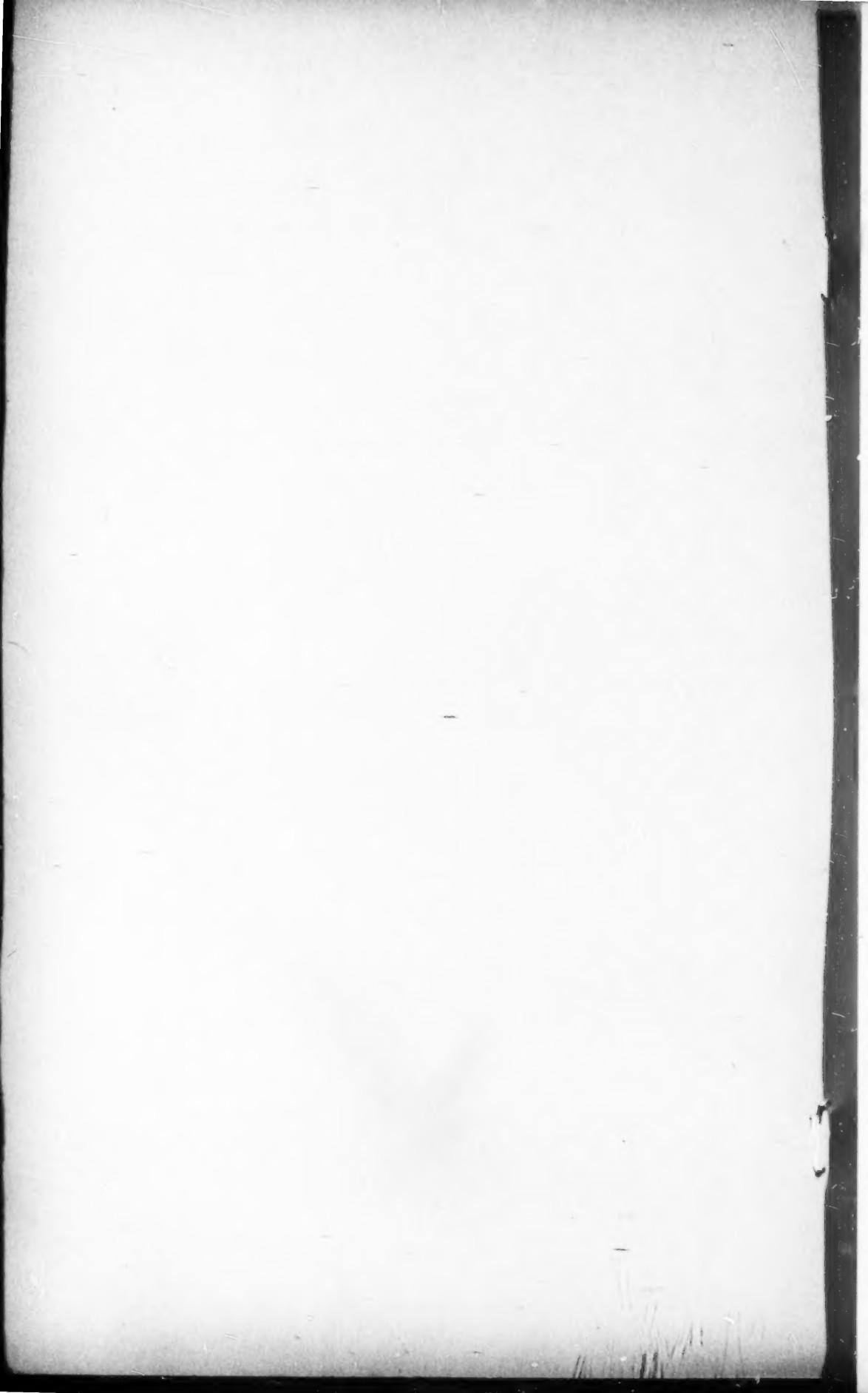
behavior despite a lawful order to do so. The objectionable behavior itself-- examples of which occurred both before and after the issuance of that directive -- forms part of the other bases upon which the agency is seeking to discipline the respondent. Since the agency is not requesting permission to punish the respondent for that objectionable conduct in this count, the underlying offensive behavior described in the reprimand will not be considered when we select an appropriate penalty to authorize for this established violation.



upon his belief that the Social Security Administration was denying recipients due process because it was allegedly engaged in an "ongoing effort to reduce the number of people on disability by any and every means." Ex. C-2 at 2.

In the reprimand, the respondent was urged to stop criticizing the Social Security Administration in his decisions. He was also specifically directed to stop discrediting the agency's evidence in cases where he concluded that claimants had been denied due process of law by the Social Security Administration. After receiving that written directive, the respondent began to provide all claimants who appeared before him with a copy of those admonitions, which he believed to be an improper intrusion upon his decisional independence.

On March 18, 1985, the Chief



Administrative Law Judge ordered respondent to stop notifying claimants of the existence of those instructions. The insubordination allegation in this count is predicated upon the respondent's refusal to comply with that order. The recommended decision finds that the respondent's failure to accede to that March 18, 1985 instruction constitutes good cause under section 7521 for the imposition of punishment. R.D. at 31.

We agree.

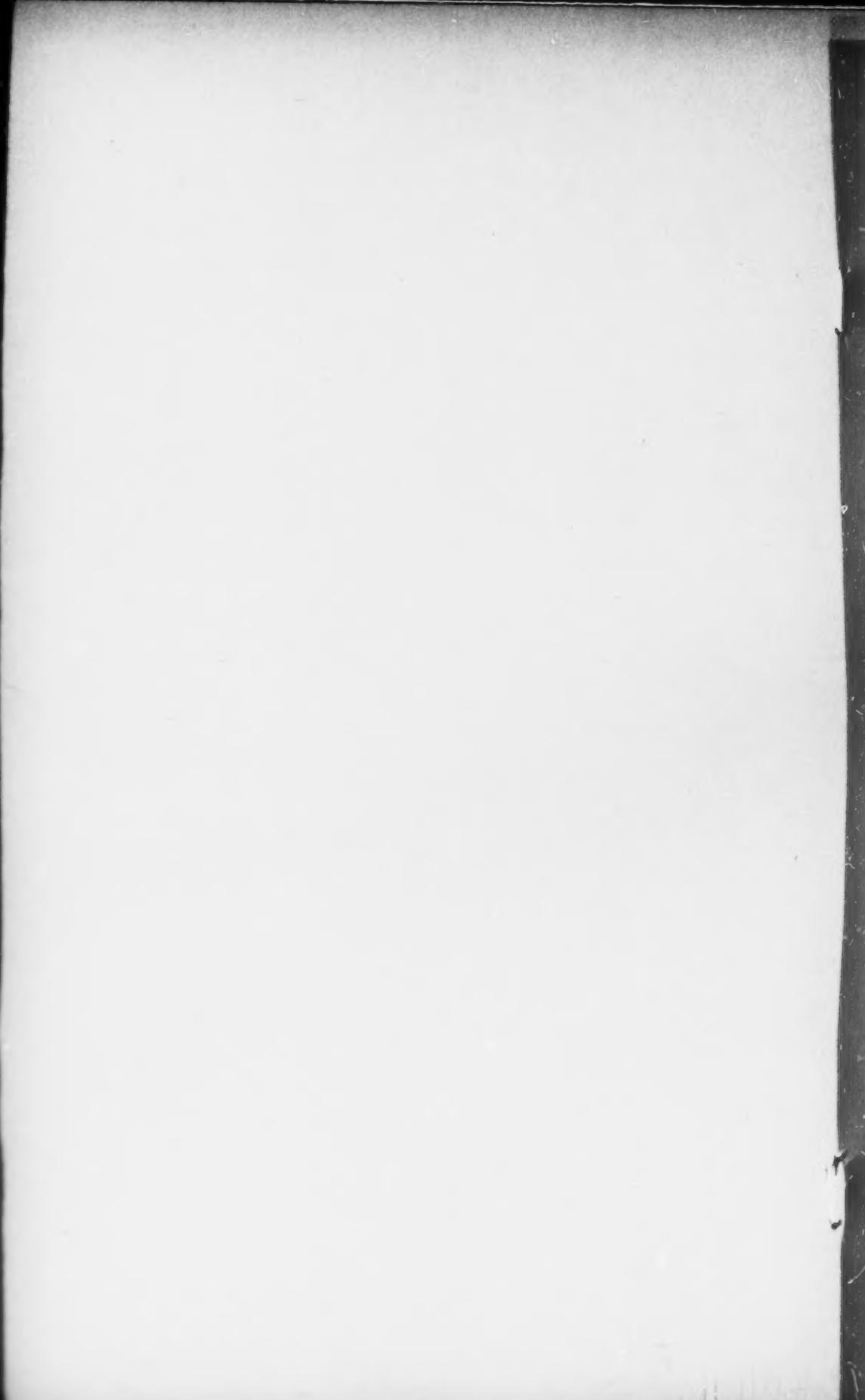
The ability of an administrative law judge to write decisions free from improper agency pressure is at the very core of an administrative law judge's decisional independence. Therefore, whenever an adverse action against an administrative law judge is based upon what is contained in his decisions, the agency must establish that its proposed



action does not impermissibly impinge on the right of the administrative law judge to determine the content of his opinions.

Social Security Administration v. Glover, 23 M.S.P.R. 57 (1984). Moreover, removal proceedings predicted upon an administrative law judge's conduct of hearings "should be reserved for those cases which involve serious improprieties, flagrant abuses, or repeated breaches of acceptable standards of judicial behavior." In re Chocallo, 1 M.S.P.R. 605, 632 (1980).

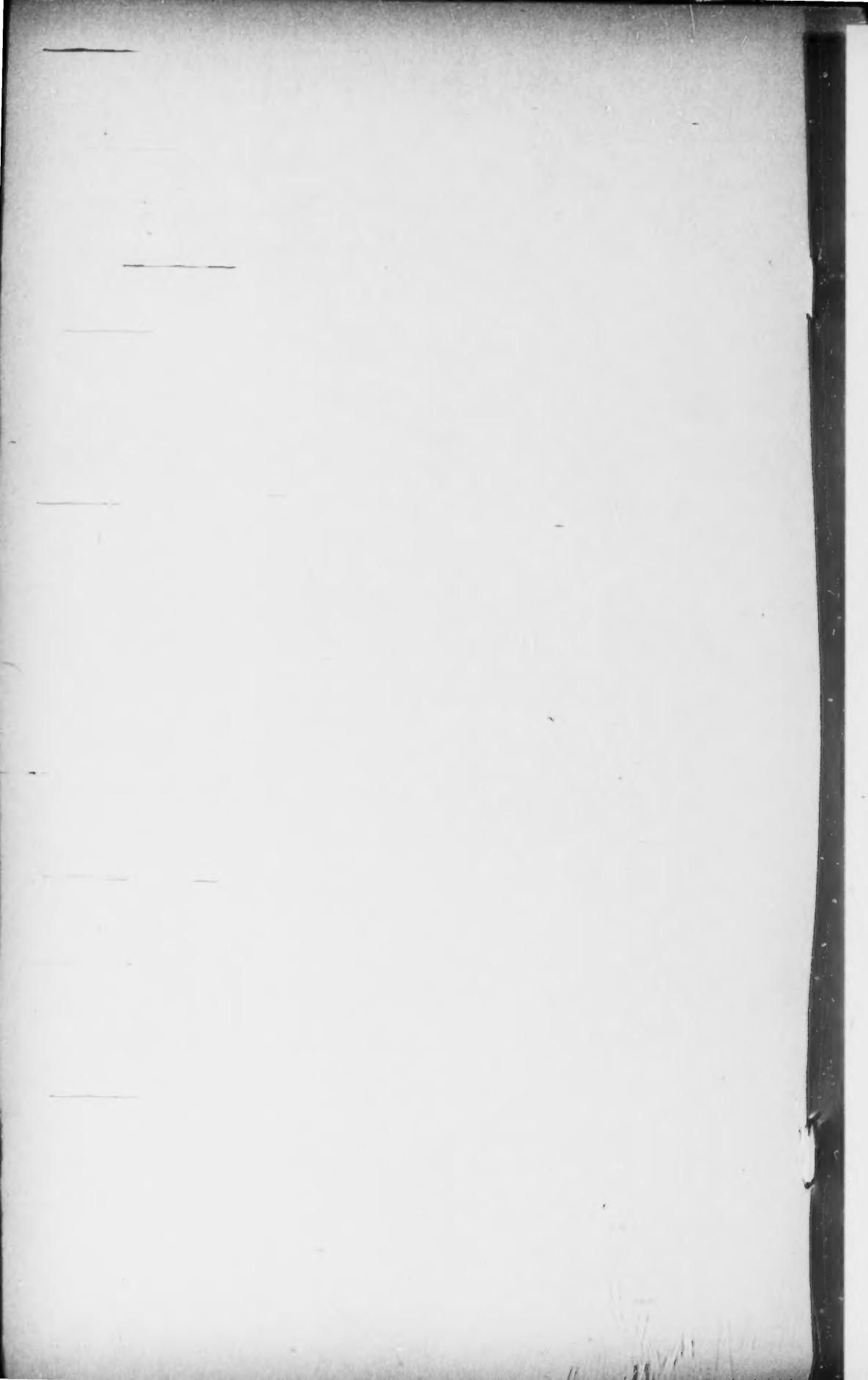
In this case, the agency has failed to establish that its instructions did not impinge upon the respondent's right to determine the contents of his decisions or that the respondent's response to those instructions involved improper judicial conduct. There is no question that the instructions issued by



the Chief Administrative Law Judge intruded upon the respondent's decisional independence. The respondent was being reprimanded for what he had said in his decisions and was being advised or ordered not to make similar statements and rulings in future decisions.

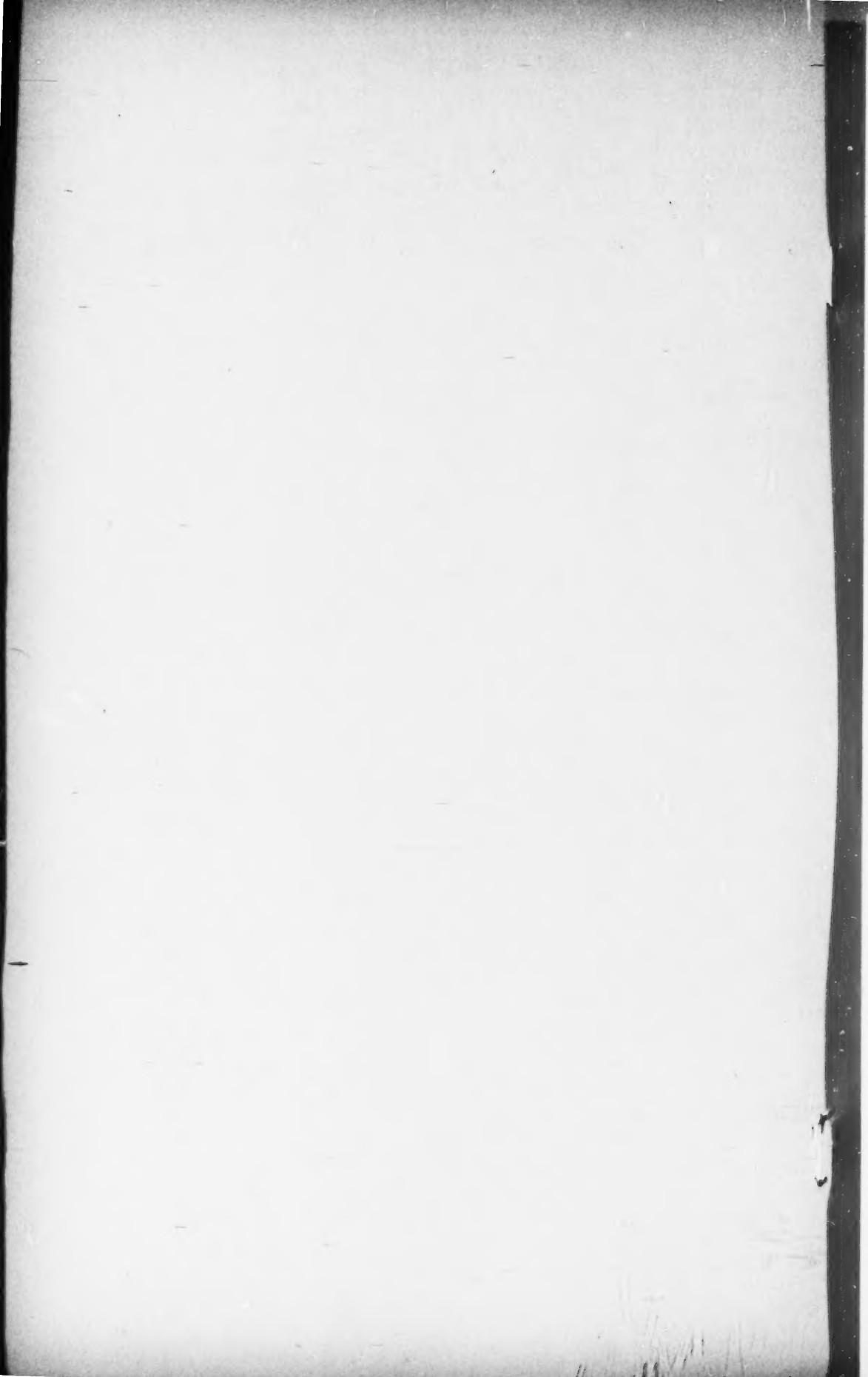
The agency attempted to justify these instructions upon the respondent's decisional independence on grounds that it was merely trying to put an end to decisional actions which were "reckless" and/or which constituted a "dereliction of duty." However, in support of this position the agency chose to rely only upon sketchy and conclusory descriptions of the respondent's judicial conduct and did not offer sufficient evidence from which it could be determined that the respondent had acted improperly.

In addition, the respondent has



contended that his actions were correct, and that they were consistent with contemporaneous Congressional and judicial criticisms of the agency's operation of the disability program. In that regard, we note that the Committee on Ways and Means, in its report on the Social Security Disability Benefit Reform Act, expressed concern over the agency's non-acquiescence policy under which the agency chose not to "follow U.S. Courts of appeals decisions with which it disagrees, either nationwide or within the circuit of the ruling." H.R. Rep. No. 618, 98th Cong., 2d Sess. 2, reprinted in (1984) U.S. Code Cong. and Ad. News 3038, 3060.

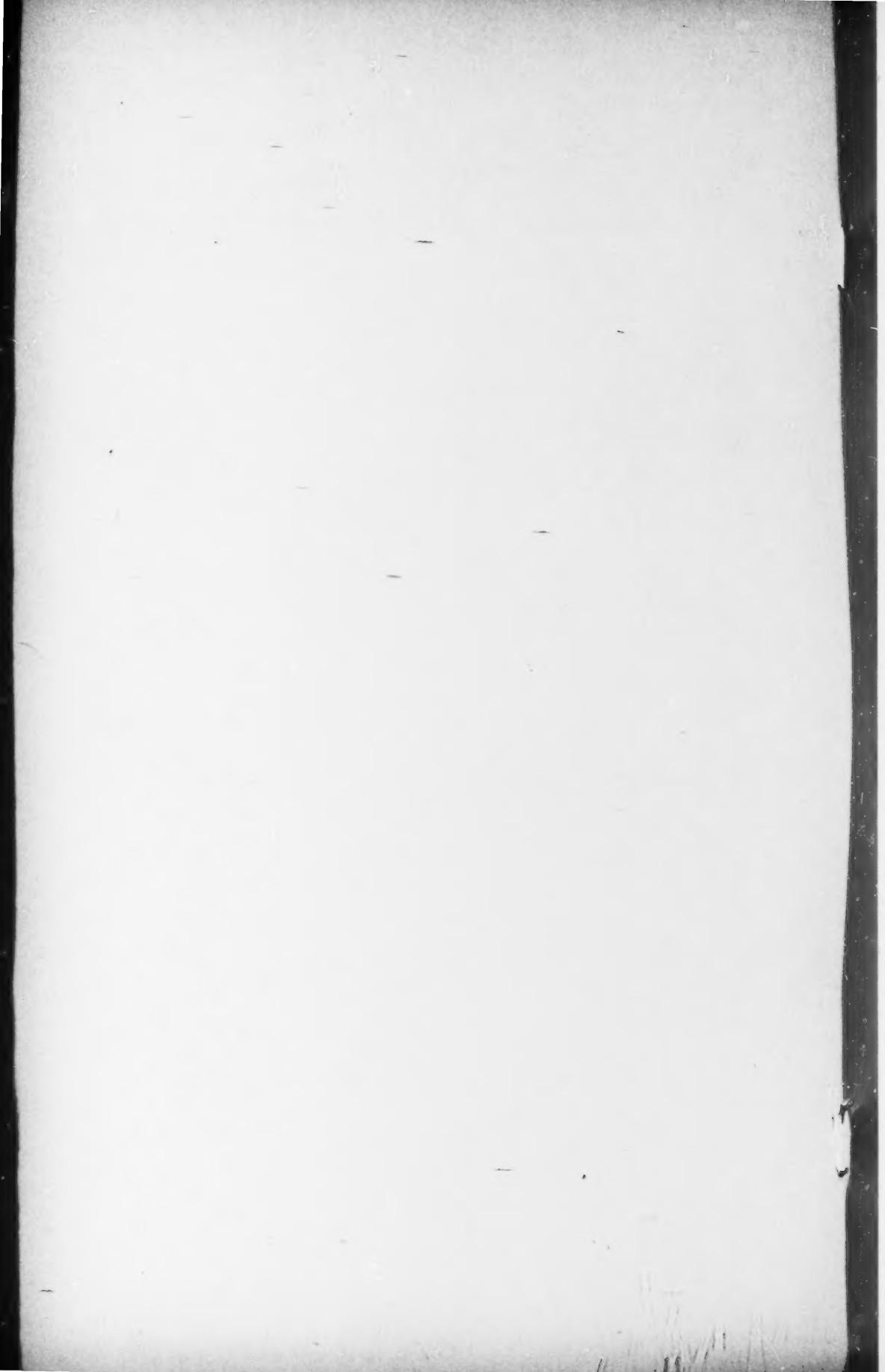
Similarly, we note that the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs issued a report



expressing its concern over the agency's apparent pressuring of administrative law judges to find more claimants ineligible. Staff of Senate Comm. on the Judiciary, 98th Cong., 1st Sess., Report on Oversight of Government Management (Comm. Print 1983).

And, we note that a federal district court judge expressed concern over the fact that the agency was pressuring doctors to reach conclusions in their reports which were contrary to their own professional beliefs, and that administrative law judges were, thereafter, placing undue reliance upon those reports. City of New York v. Heckler, 578 F.Supp. 1109, 1124 (E.D.N.Y. 1984), aff'd sub. nom. Bowen v. City of New York, 476 U.S. 467 (1986).

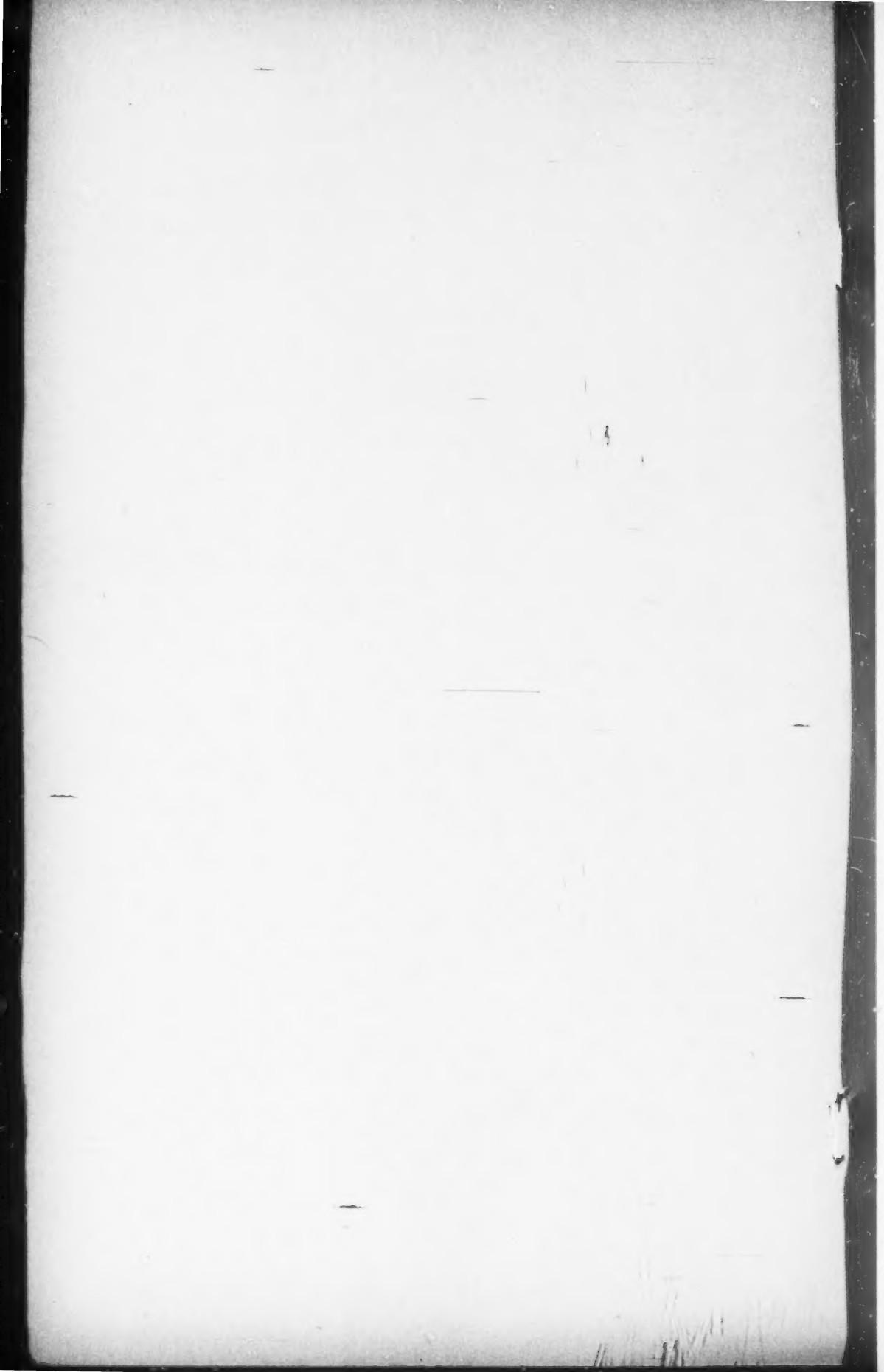
With that as a context, we cannot find, without adequate evidence from the



agency, that respondent's comments or actions were either reckless or in dereliction of his duties. Therefore, the agency has not established that it was justified in its attempted intrusion upon the respondent's decisional independence.

Moreover, we cannot fault the respondent's decision to inform claimants who appeared before him of the administrative attempt to affect his decisions. The respondent's notification of claimants was not a flagrant or an actionable abuse of his judicial powers. Considerations of fairness may well have required him to tell claimants about agency admonitions which he believed affected his ability to exercise judicial independence in their cases.

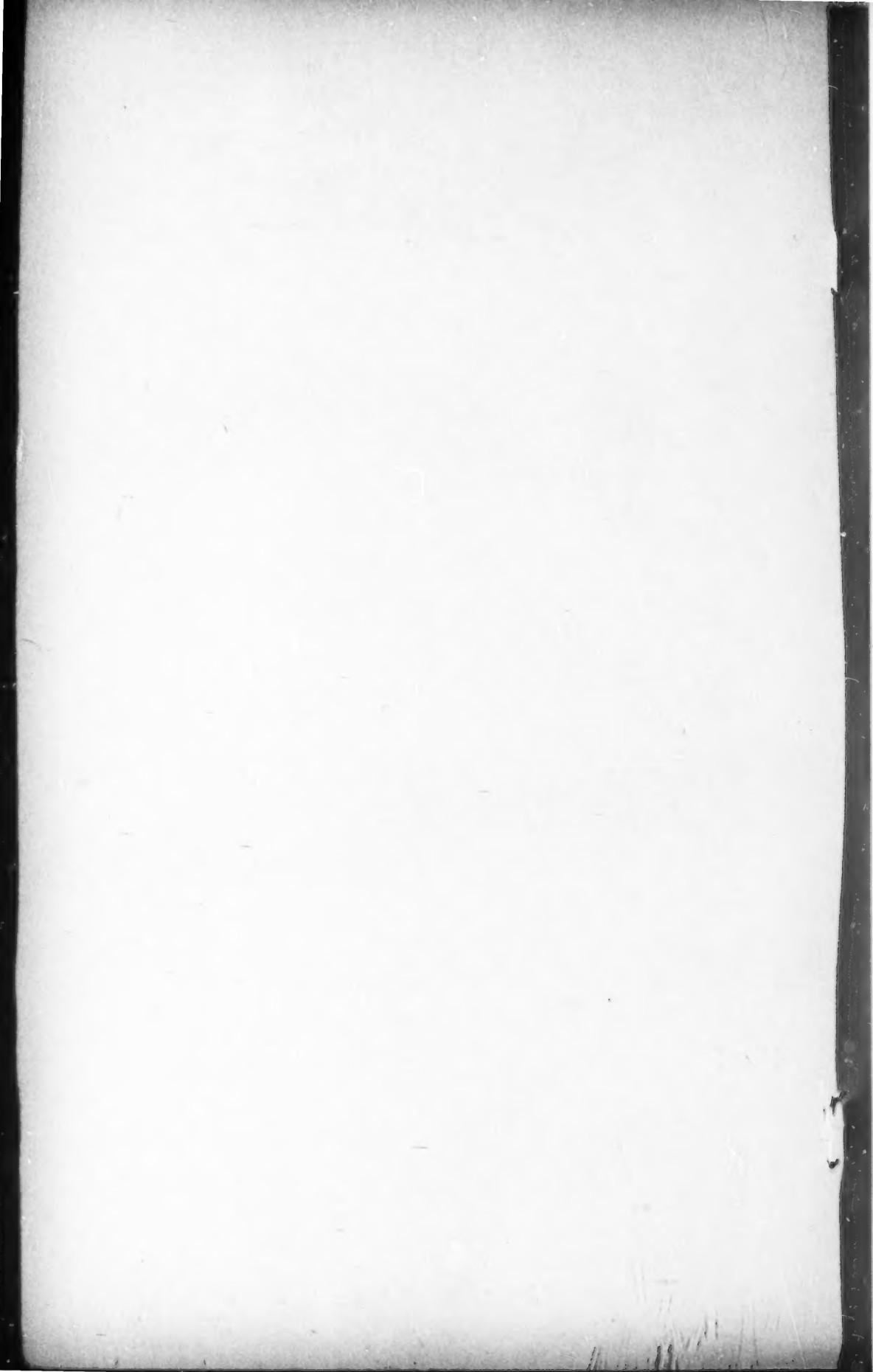
And the fact that the agency subsequently ordered the respondent to



stop informing claimants of those admonitions placed the respondent in an untenable position. That March 18th order gave the respondent an unacceptable choice. He could follow the order and not reveal what he believed to be an unwarranted intrusion into his decisional independence, and one which claimants might reasonably believe would affect their right to a fair hearing -- or he could disobey the order and risk additional disciplinary action. The respondent's refusal to comply with this order under those circumstances does not constitute good cause under section 7521.

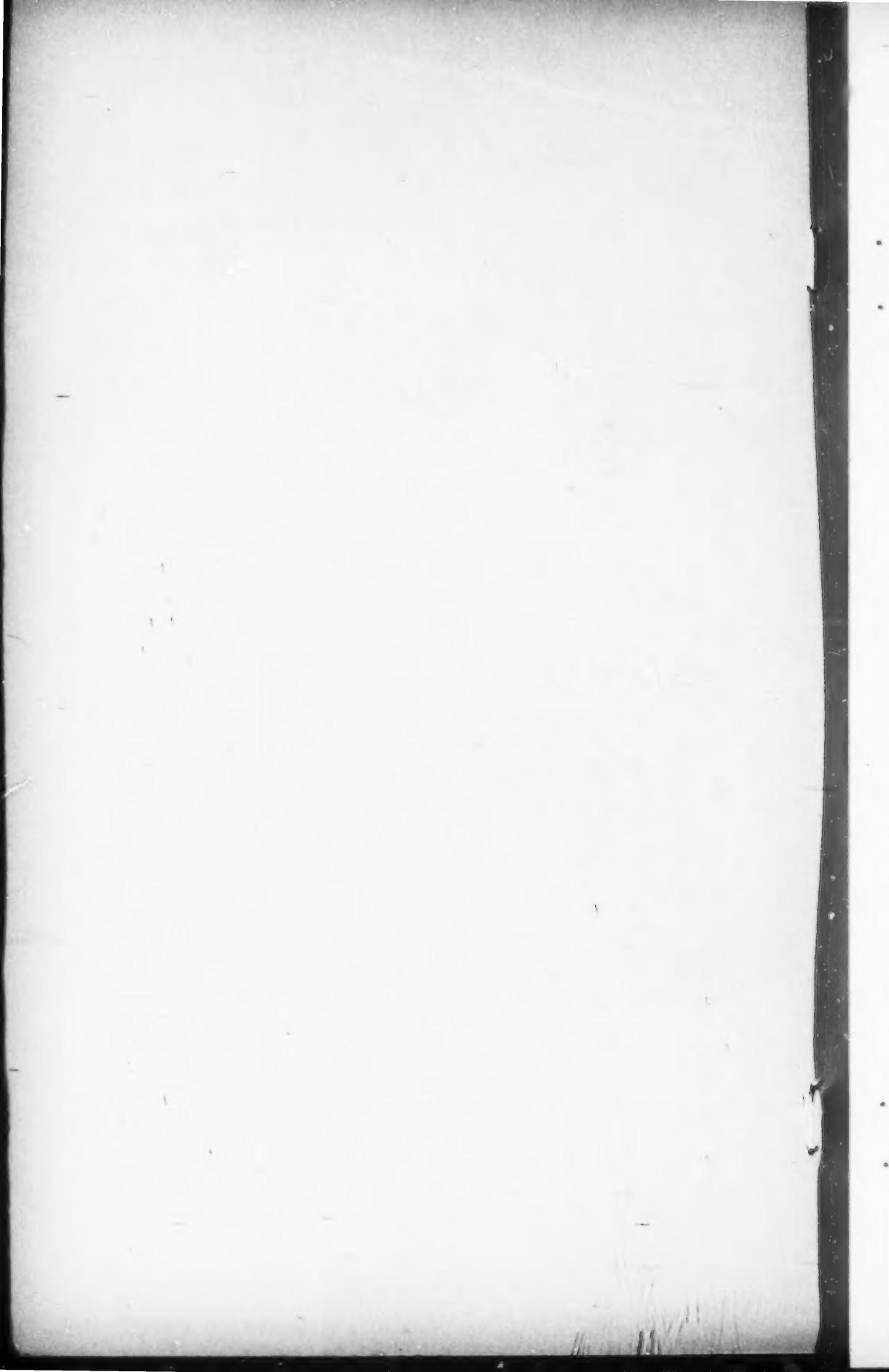
Count Five

In Count Five, the agency charged the respondent with the insubordinate misuse of official, i.e., free, mail envelopes. The respondent did not contest the factual basis for this



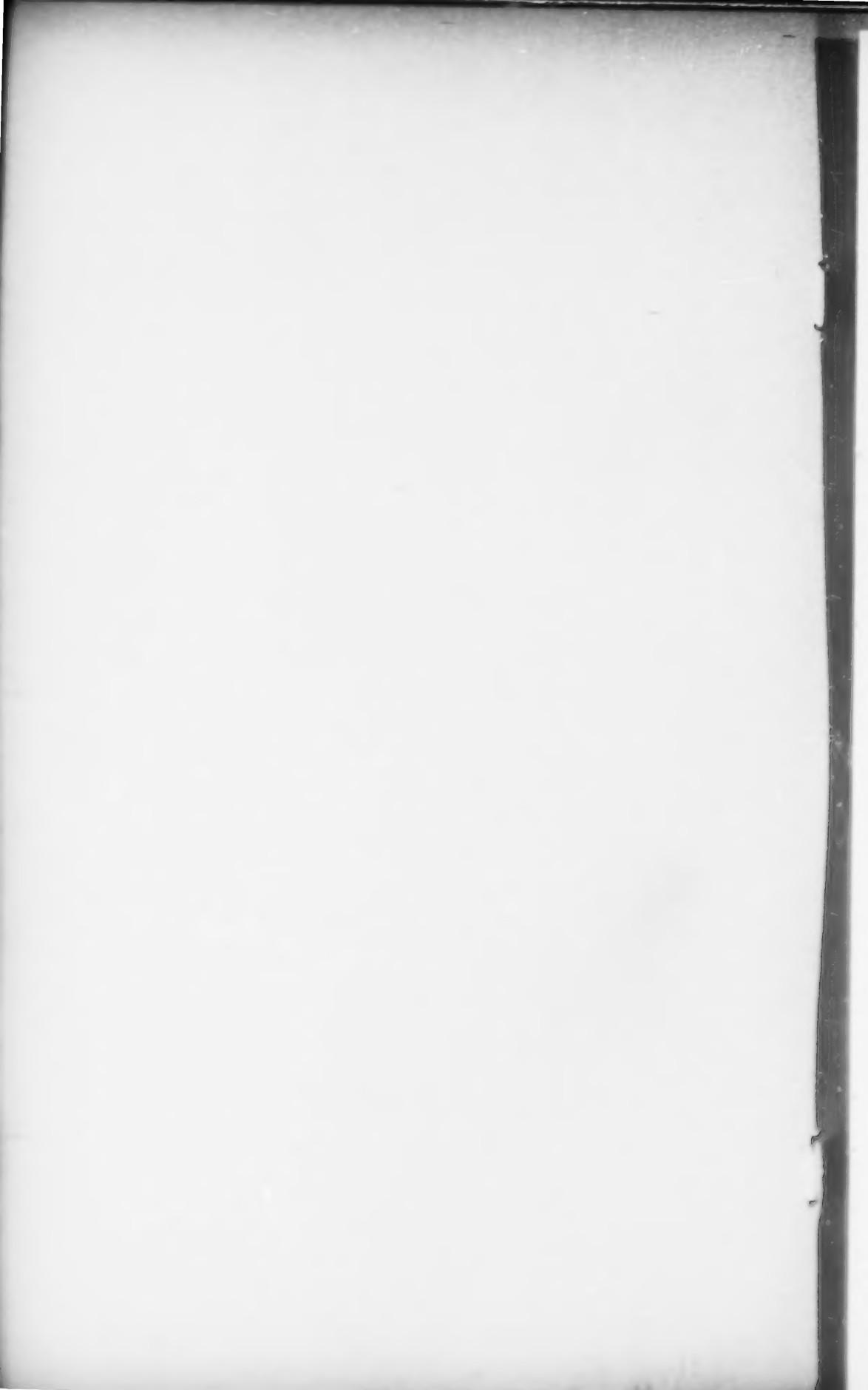
charge. For over two years, despite repeated instructions to stop, the respondent on numerous occasions used official envelopes to mail his grievances, to make Freedom of Information Act request to the agency, and to mail letters complaining about the agency to members of the media, elected officials, and the EEOC. The recommended decision finds that this use of free mail envelopes was unlawful and insubordinate, and that it constitutes good cause to discipline and administrative law judge. R.D. at 32-33. We agree.

Misuse of free mail privileges has been held to violate the efficiency of the service standard. Laursen v. Veterans Administration, 4 M.S.P.R. 66 (1980). We now hold that where, as here, there is a serious and insubordinate abuse of those privileges, misuse can



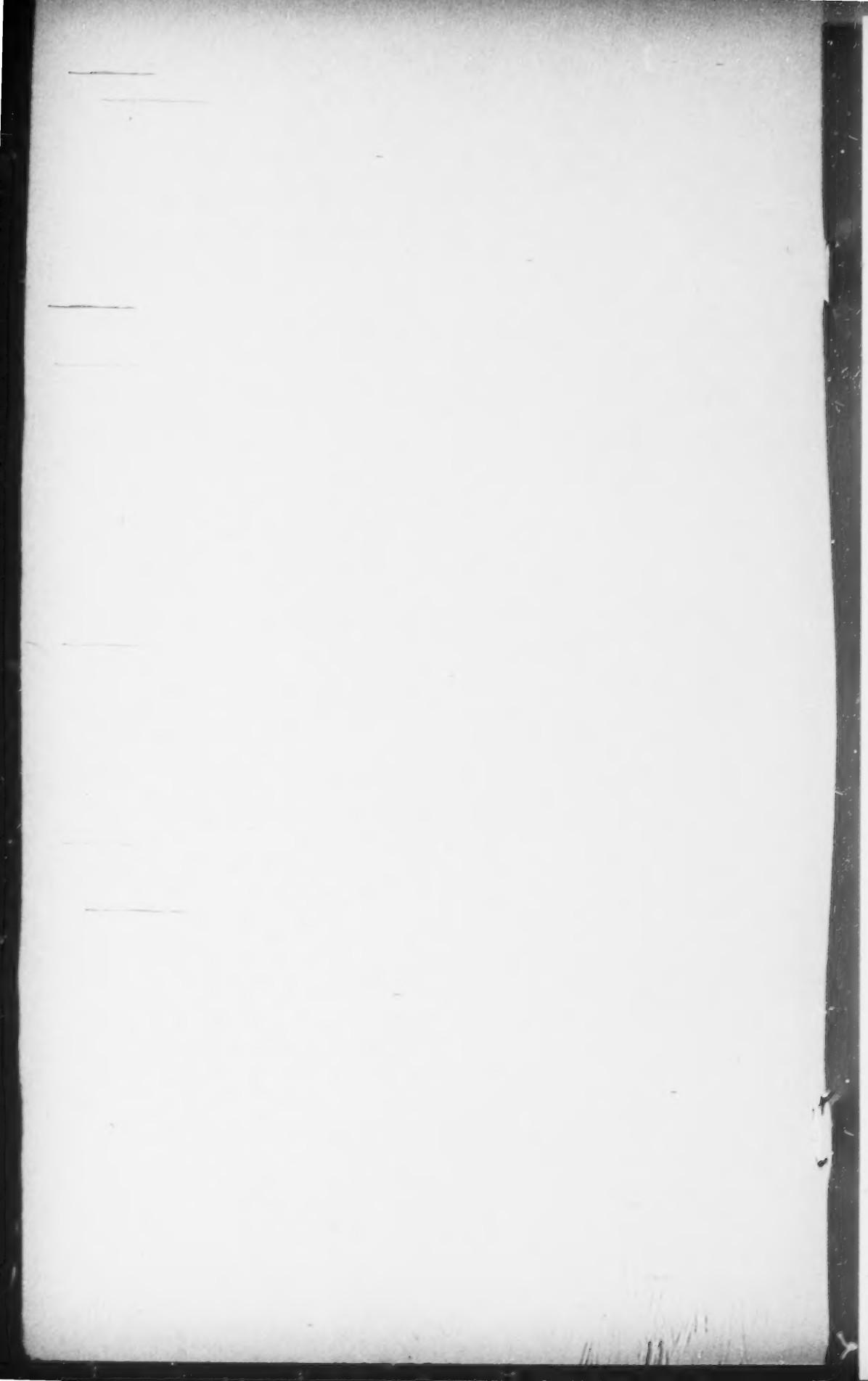
also violate the good cause standard contained in section 7521. Abuse of the free mail privilege is not only against the law, it can also constitute the basis for criminal charges. See 39 U.S.C. Section 32201 et seq. and 18 U.S.C. Section 1719. Therefore, when the respondent insubordinately abused those privileges, he called into question his qualifications to serve in a judicial role and committed acts which could undermine the confidence of the public in the administrative adjudicatory process.

The respondent contends, however, that he did not, in fact, abuse the free mail privileges because most of the voluminous mailings at issue in this count related, directly or indirectly, to activities which the government protects or encourages. In fact, in sending his letters, the respondent was utilizing the



grievance and discrimination compliant process; he was, at least arguably, engaging in whistleblowing activities; he was seeking information from the government; and he was corresponding with elected officials.

Nevertheless, we find that the respondent's contention lacks merit. Encouraged or protected activities are not necessarily the same as official activities. Congress has protected most of the activities for which the respondent utilized free mail envelopes by making it unlawful for agencies to wrongfully retaliate against employees for participating in those activities. However, Congress did not declare, and no court has found, that those encouraged or protected activities are official business, within the meaning of that term in 39 U.S.C. Section 3201. Moreover,



generally, in determining what constitutes official government business, the Postal Service defers to the judgment of the individual agencies (Ex. R-100 at 1) and, here, the agency has established that under its policy these types of mailings are not official business. Tr. Vol. I, pp. 66-69, also see Ex. R-113 at 4. Further, the respondent was advised by the EEOC that it was its policy not to accept correspondence in franked mail envelopes. Tr. vol. I, pp. 44-45. Therefore, despite the fact that the activities engaged in by the respondent may all have been favored by law, we find that the respondent was not entitled to use free official mail envelopes to engage in those activities.

Penalty

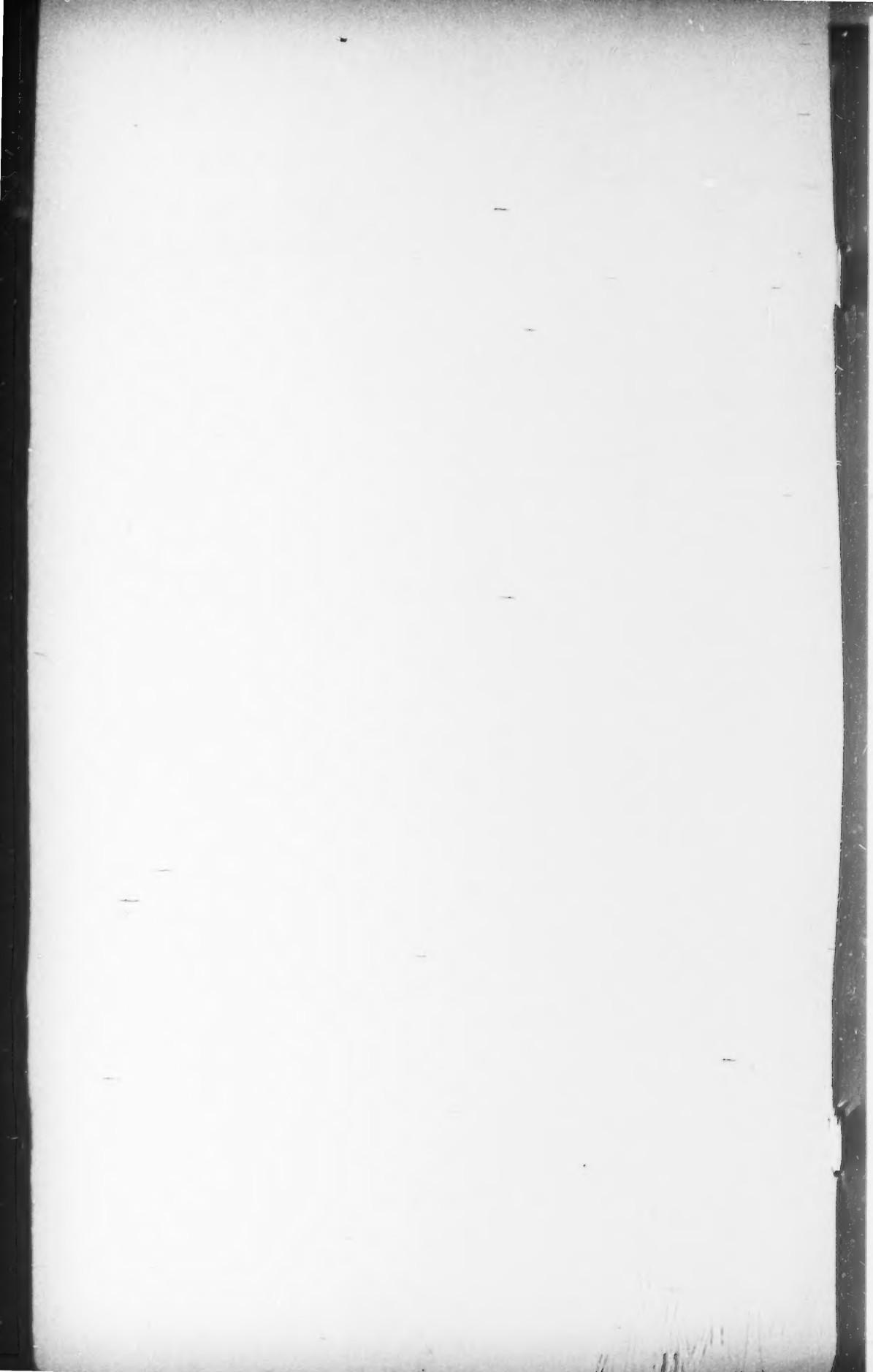
In section 7521 cases, it is this Board, rather than the employing agency,



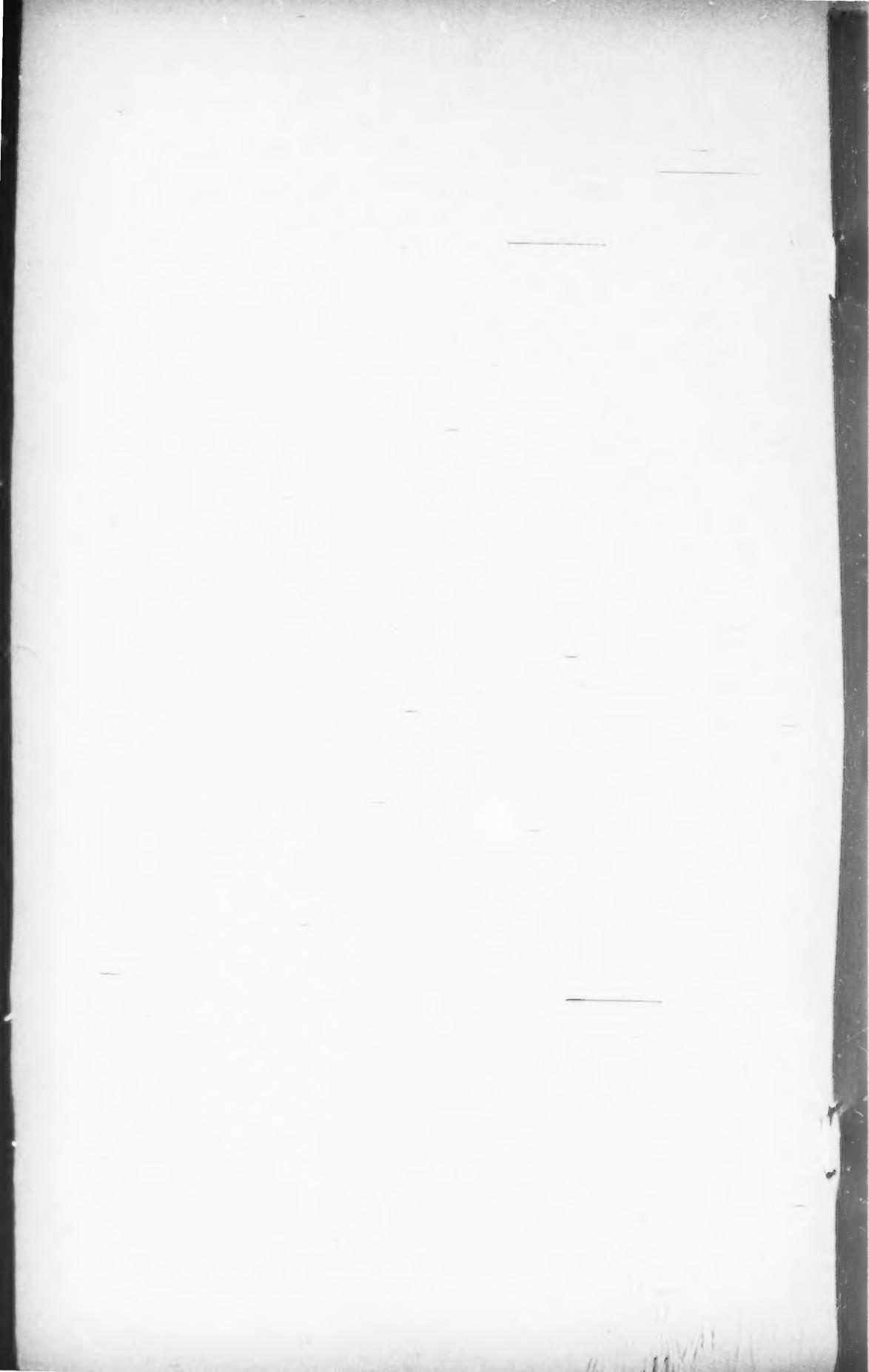
which selects the appropriate penalty and, in making that determination, the standards articulated in Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981), are looked to for guidance. The recommended decision found that the agency established good cause for disciplining the respondent under each of the five counts in this complaint. After considering the Douglas factors, it recommended that the respondent be removed from the federal service.

We have found that the agency established good cause under only four of the five counts. Despite that difference, we agree with the recommended decision's conclusion that the agency should be authorized to remove the respondent from the federal service.

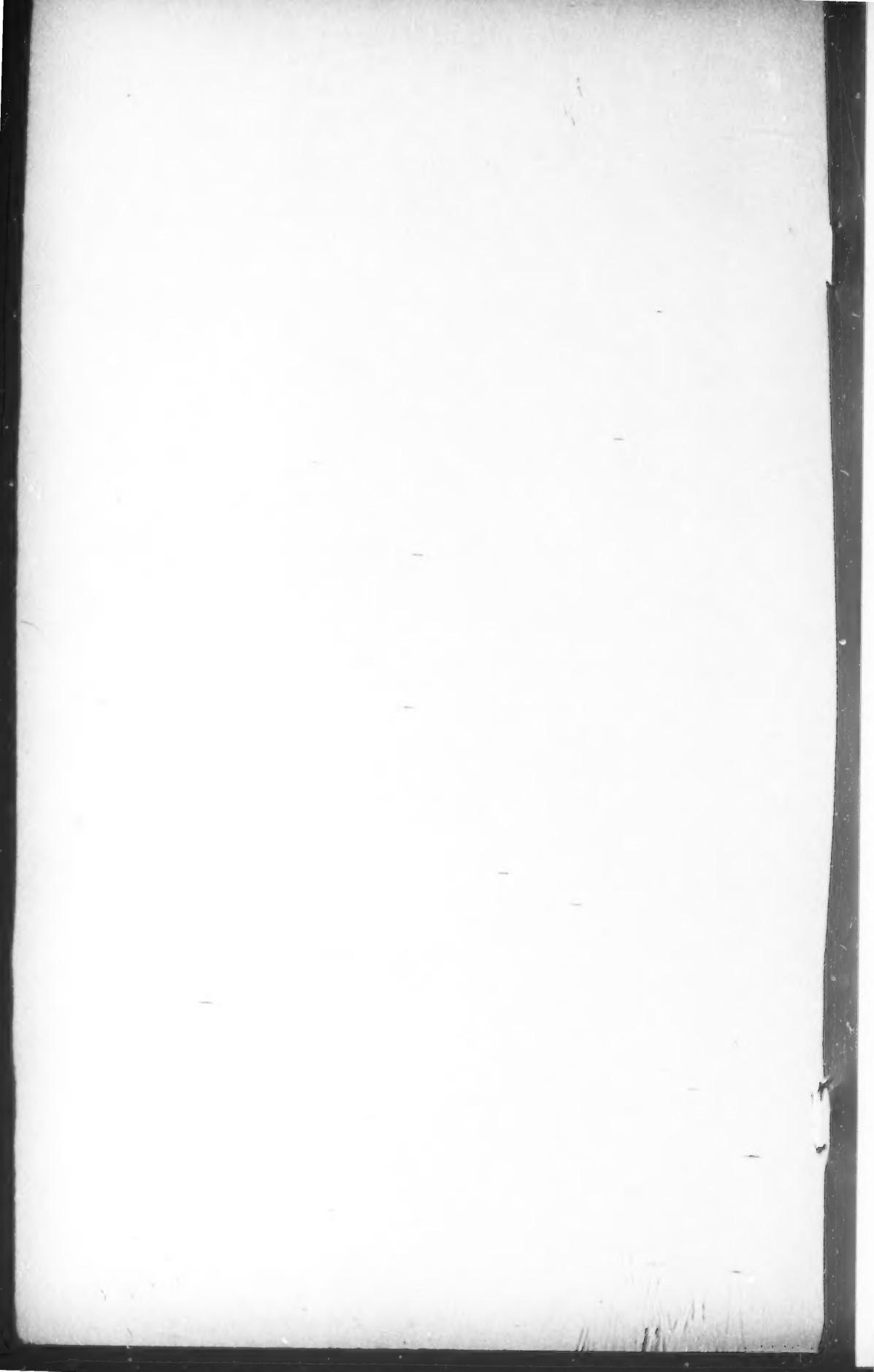
The respondent's behavior which formed the basis for the first two counts



is unacceptable in any workplace. He acted in an exceedingly abusive manner for several years. The existence of this long-term pattern of outrageous conduct makes the possibility of rehabilitation extremely unlikely. Moreover, there is no indication in the record that this respondent is capable of moderating his excessive behavior. Therefore, removal is justified on the basis of the repeatedly objectionable and offensive conduct established under either of those counts. In addition, given the severity of either of those offenses, no alternative sanction would constitute an adequate punishment. Therefore, even after considering all mitigating factors, including respondent's work record and his length of service, we still conclude that removal is warranted for each of those offenses.



Since we are, herein, authorizing the agency to impose the most severe discipline allowable by law for the violations established under each of the first two counts, no additional punishment can be imposed for the other violations. However, had those other and less serious violations been the only established charges, we would have authorized the agency to suspend the respondent for 30 days under Count Three and for 60 days under Count Five.



Conclusion

Good cause has been established to authorize the removal of the respondent from the federal service. Accordingly, the Social Security Administration is AUTHORIZED to so remove the respondent from the federal service.

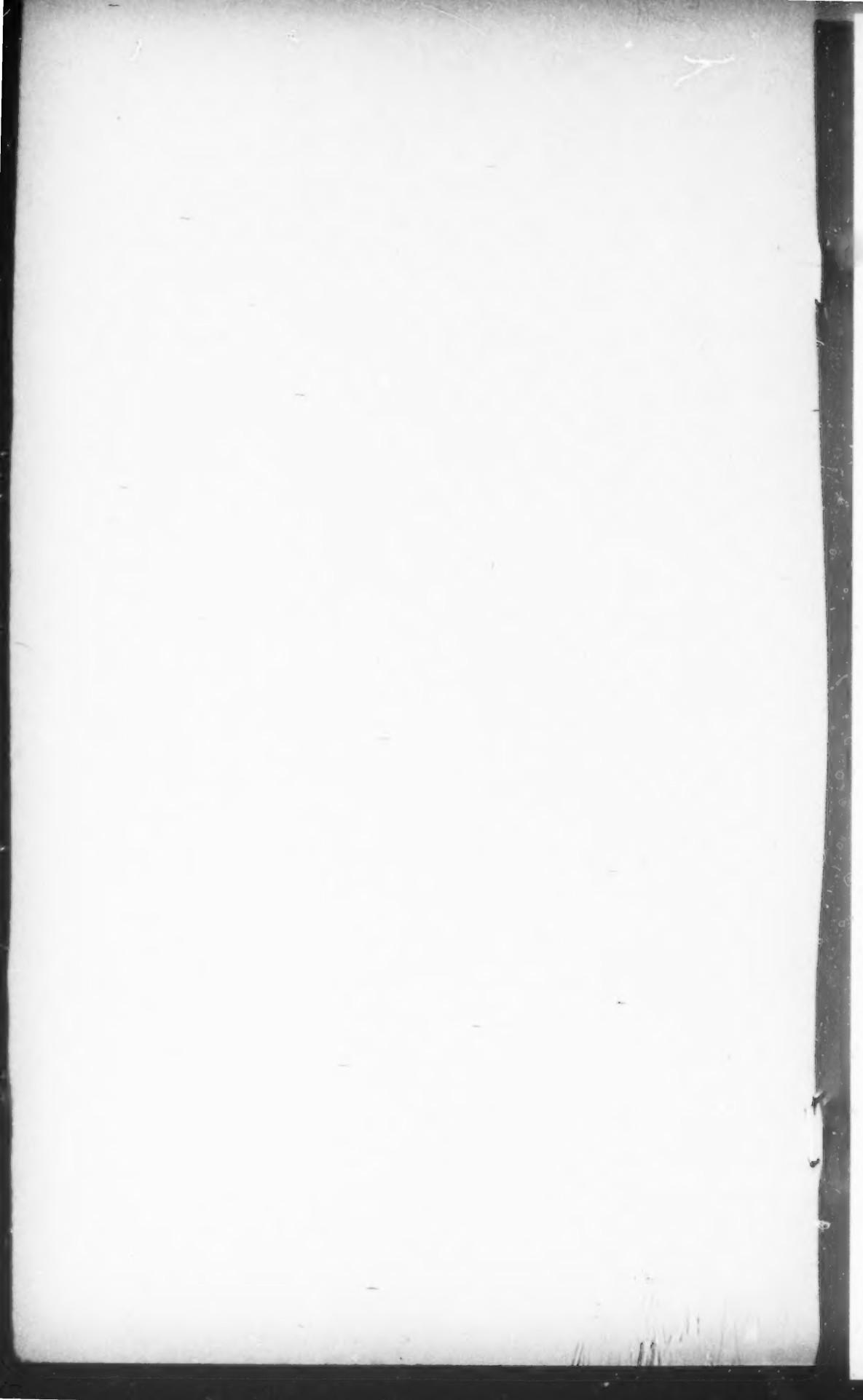
This is the final decision of the Merit Systems Protection Board. The respondent has the right to seek judicial review as provided in 5 U.S.C. Section 7703.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

APPENDIX B 000046



CERTIFICATE OF SERVICE

I certify that this ORDER was sent today:

By certified mail to:

Don Edgar Burris, Esquire
2251 South 56th Street West
Billings, MT 59106

By regular mail to:

Eileen Inglesby Houghton, Esq.
Department of Health and
Human Services
Office of General Counsel
Room 5362 North Building
330 Independence Avenue, SW.
Washington, DC 20201

John Mathias, Esquire
Federal Administrative Law
Judges Conference
1818 H Street, NW.
Washington, DC 20006

Mr. Timothy M. Dirks
Office of Personnel Management
Employee Relations Division
1900 "E" Street, NW.
Room 7635
Washington, DC 20415



By hand to:

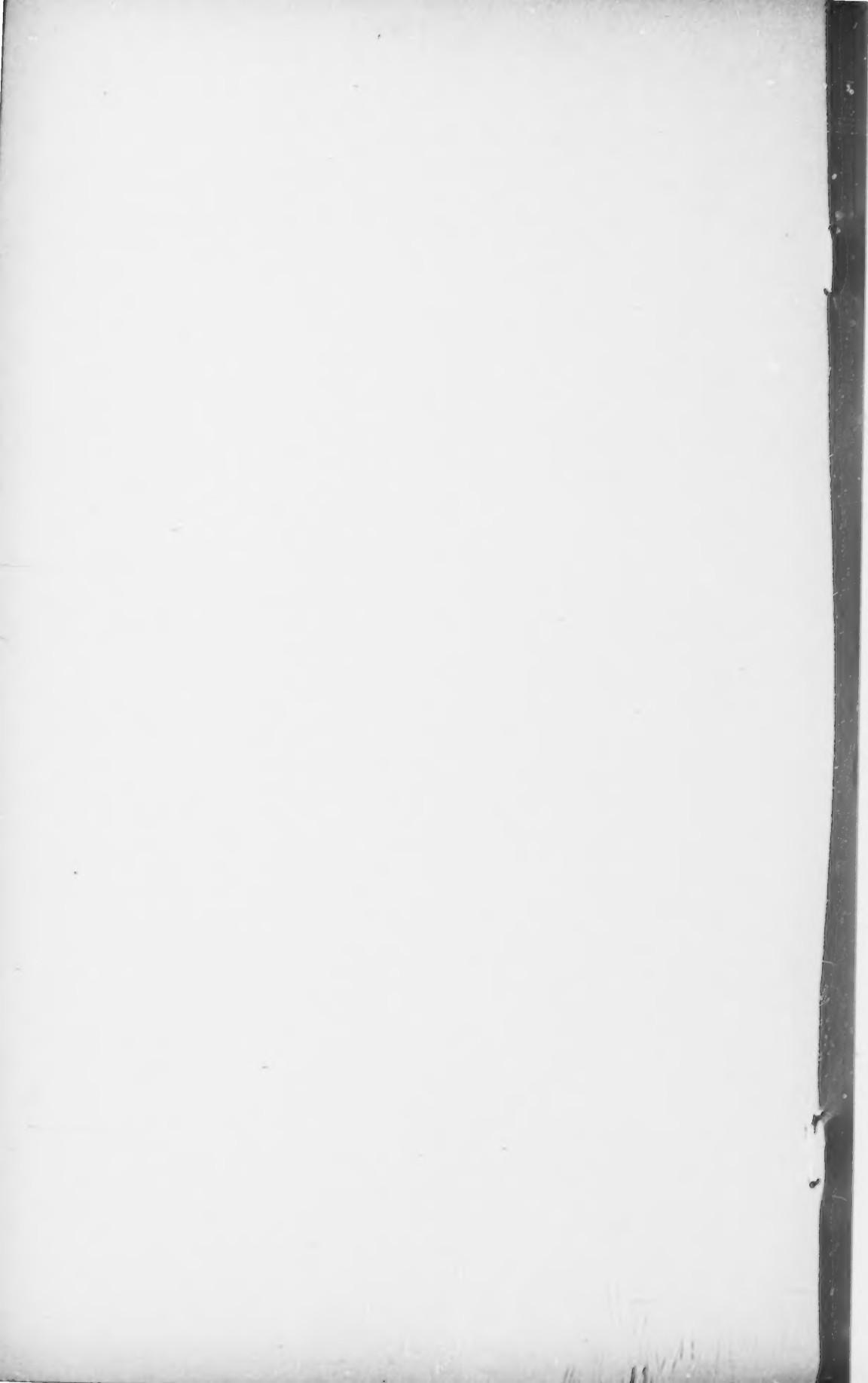
Office of the Administrative
Law Judge
Merit Systems Protection Board
1120 Vermont Avenue, NW.
Washington, DC 20419

Nov. 3, 1988
(Date)

Robert E. Taylor
Clerk of the Board

Washington, D.C.

APPENDIX B 000048



UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
OFFICE OF THE ADMINISTRATIVE LAW JUDGE

)
SOCIAL SECURITY) DOCKET NUMBER
ADMINISTRATION,) HQ75218610023
DEPARTMENT OF HEALTH)
AND HUMAN SERVICES,)
Complainant,)
)
v.)
) DATE: June 29, 1987
DON EDGAR BURRIS,)
ADMINISTRATIVE LAW)
JUDGE,)
Respondent.)
)
)

Eileen Inglesby Houghton, Esquire, and
Daniel J. Edelman, Esquire, for
complainant.

Honorable Don Edgar Burris, pro se.

BEFORE

Edward J. Reidy
Chief Administrative Law Judge

RECOMMENDED DECISION

INTRODUCTION

APPENDIX C 000043



The Office of Hearings and Appeals (OHA) of the Social Security Administration, by complaint filed June 27, 1986 under 5 C.F.R. Section 1201.131 et seq. and 5 U.S.C. Section 7521(a), proposes the removal of Administrative Law Judge (ALJ) Don Edgar Burris in a five count complaint.¹ The Board assigned this matter to me for appropriate disposition. Respondent answered the complaint, the parties conducted discovery, and an oral hearing was held before me during the fall of

¹Complainant charges respondent with the following misconduct: Count One - Insubordination, disruption and unprofessional actions amounting to open contempt and defiance of administrative authority; Count Two - Malicious use of grievance procedures; Count Three - Insubordination in refusing to follow a lawful order of a supervisor; Count Four - Insubordination in refusing to obey another lawful order of his supervisor; and Count Five - Misuse of government penalty mail envelopes for personal correspondence.



1986. Post-hearing briefs have been filed and considered in making my recommendations. But see comments, infra.

Under 5 U.S.C. Section 7521,² the essential question is whether good cause is shown for the proposed agency action, a showing which the agency must shoulder by the preponderant evidence. See 5 C.F.R. Sections 1201.56(a)(ii) and 1201.136 and Brennan v. Department of Health and Human Services, 787 F.2d 1559 (Fed. Cir.), cert. denied, 107 S. Ct. 573 (1986). If good cause is properly established, an

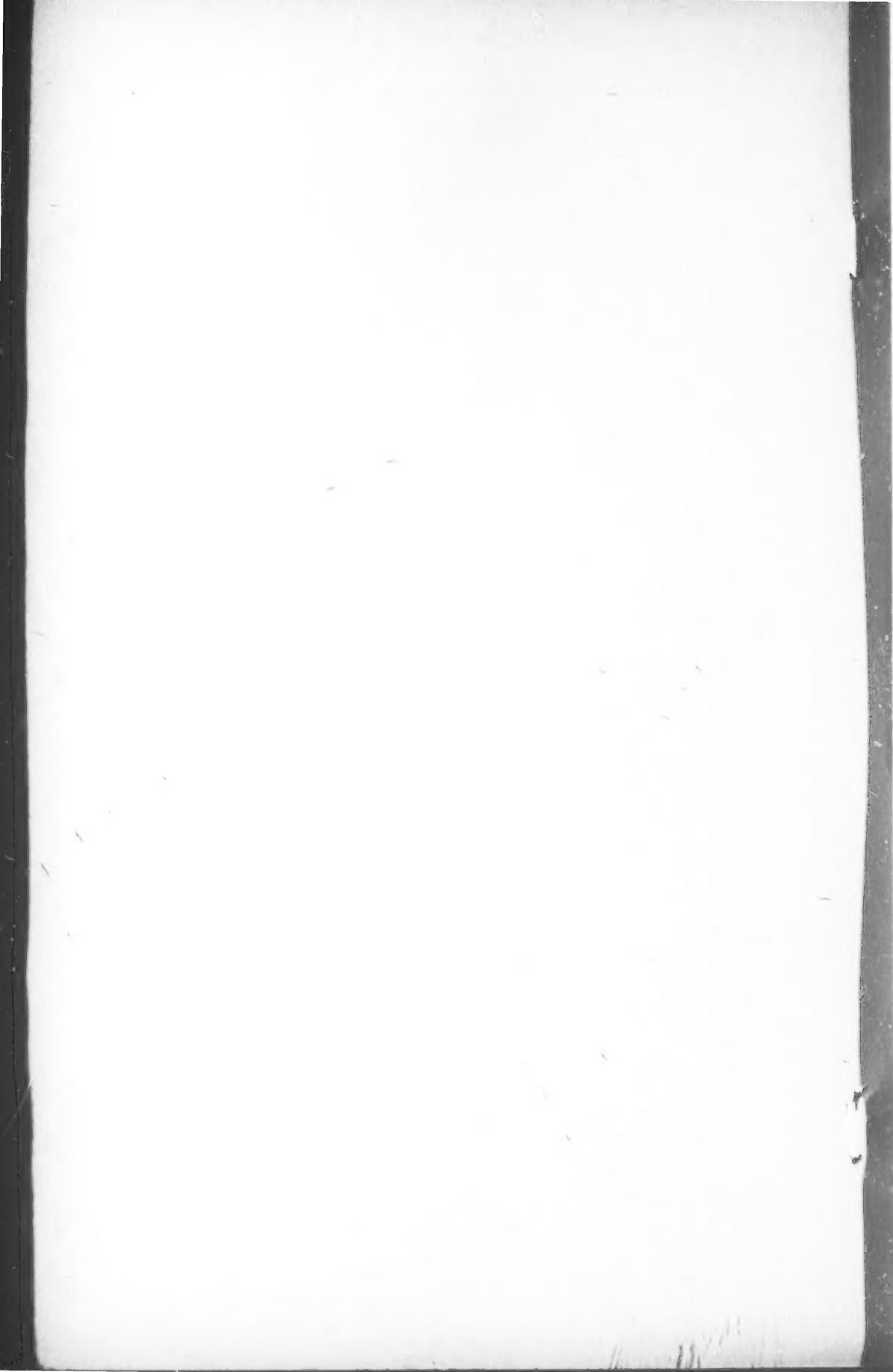
²Title 5, U.S.C. Section 7521 provides:

(a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.



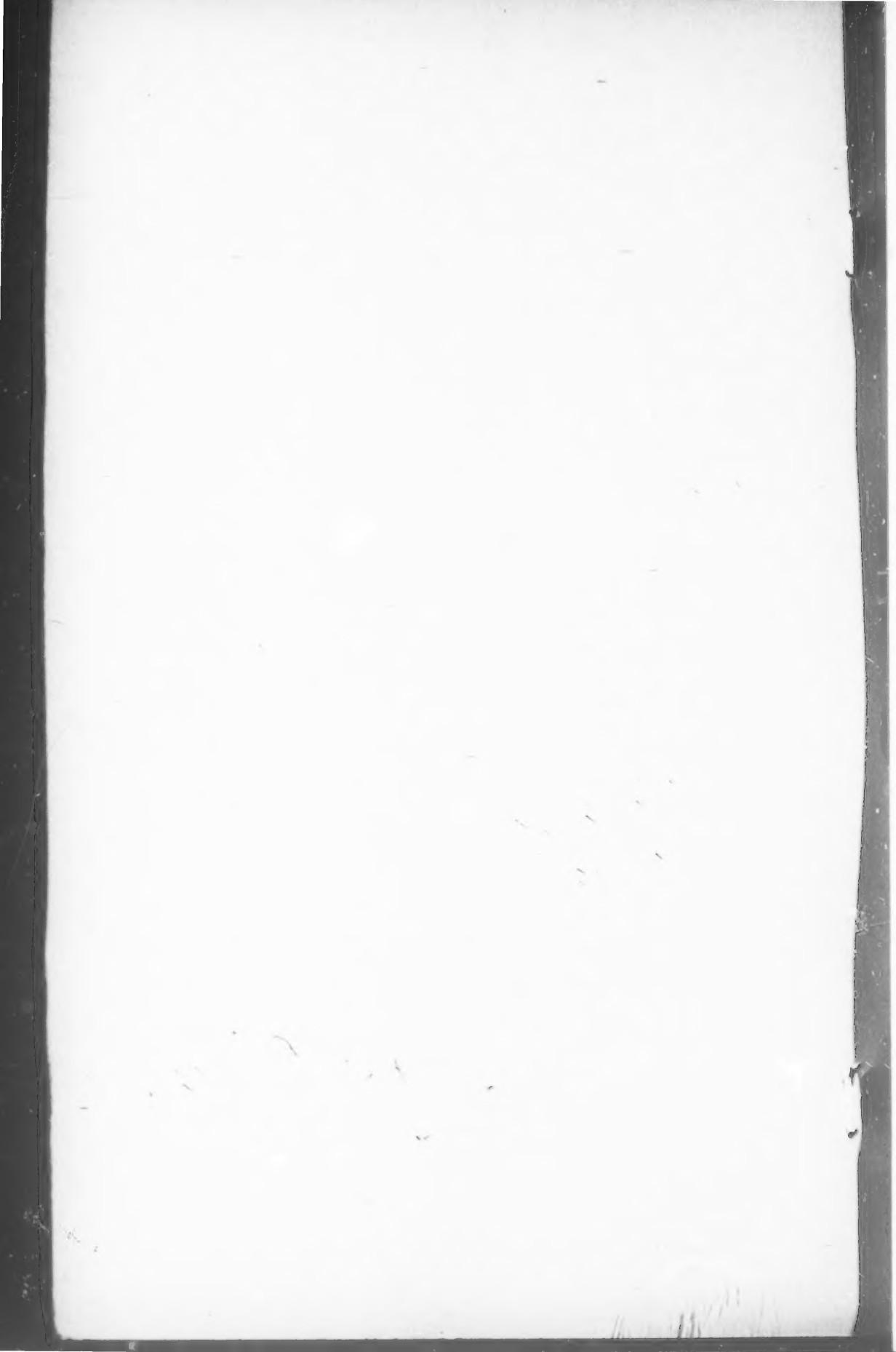
appropriate penalty must then be recommended.

Congress intentionally gave no definition of "good cause," in enacting section 7521, leaving its meaning to be developed through judicial interpretation. And while no succinct definition of "good cause" has yet been provided by the judiciary, it has been made clear that if an agency bases a charge of misconduct by an ALJ on reasons which improperly interfere with the ALJ's performance of his quasi-judicial functions, the charge cannot constitute "good cause." Id. It seems fair to say, therefore, that an analysis of these charges can be properly conducted through a two-step process. First, a determination must be made whether any charge is supported by the preponderant evidence. If so, it must be determined



whether it constitutes "good cause" to take action. It is in that latter analysis when the issue of interference with an ALJ's qualified independence must be considered for Nash v. Califano, 613 F.2d 10 (2d Cir. 1980) makes it clear that ALJs may contest agency practices which interfere with the exercise of their qualified right of decisional independence.

Throughout this proceeding, respondent objected to having been rushed to hearing unfairly. Yet, he has been afforded, in my judgment, a full and reasonable opportunity to refute the charges and otherwise contest the proposed action. To be sure, he took advantage of his opportunity to defend. Compare Social Security Admin. v. Glover, 23 M.S.P.R. 57 (1984). The complaint was filed June 26; the hearing was held in



late October of that year.

BACKGROUND

Respondent has been employed as an ALJ in OHA for 11 years. After an initial indoctrination period he was assigned to the Billings, Montana facility where he is still stationed.³ When he first arrived in Billings, respondent was the lone ALJ. As the workload increased, so did the staff. There now are three ALJs assigned to Billings, and administrative control of the office vests in Hearing Office Chief ALJ (HOCALJ) Robert D. Hiaring, who reports to Regional Chief ALJ James R. Rucker. Judge Rucker in turn reports directly to the Chief Judge of OHA, and OHA is headed by an Associate Commissioner who has managerial authority

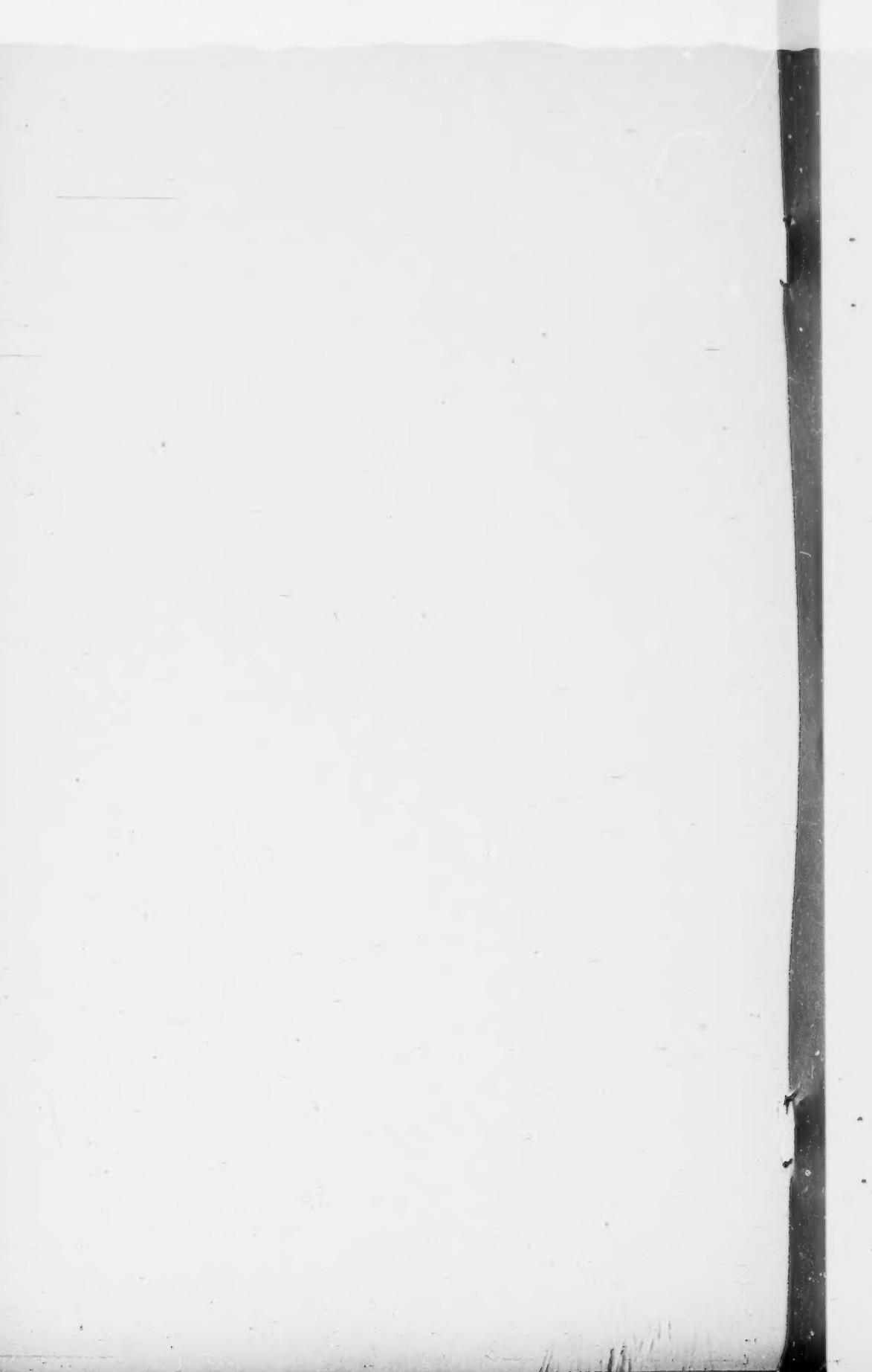
³At present, Judge Burris is on administrative leave.



over the entire OHA.

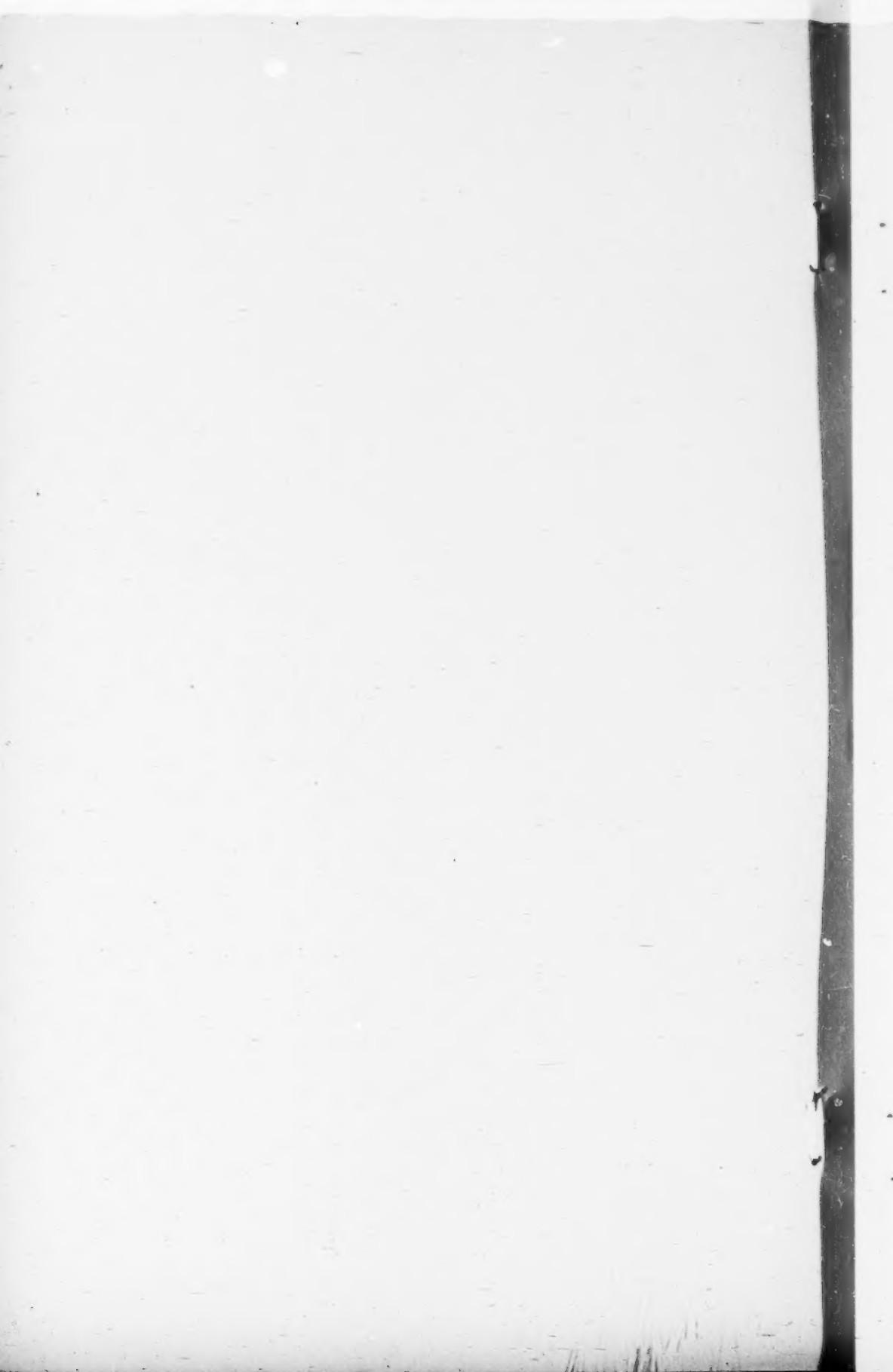
During his early years at Billings, respondent was in charge of the office. In June of 1980 he was named Acting Administrative Law Judge (ALJIC).⁴ By 1981 a second ALJ was assigned to Billings, and in 1983 Judge Hiaring arrived. In March of 1984, respondent was relieved of his duties as Acting ALJIC, and for a time in 1984 Judge Rucker, the Regional Chief Judge, assumed the added duty of ALJIC of Billings OHA. In June of that year Judge Hiaring was named ALJIC. As the record evidence makes perfectly clear, these personnel changes -- and especially the removal of respondent as Acting ALJIC -- sparked resentment in Burris. It bears noting that there is also evidence that

⁴That position is now called Hearing Office Chief Administrative Law Judge.



respondent's removal as Acting ALJIC was due to dissatisfaction with his stewardship.

Also plain from this record is the fact that , for several years now, Billings OHA has been far from a happy or organized workplace. There is obvious jealousy and pique among senior support staff. Personal and professional contact between HOCAIJ Hiaring and respondent are virtually non-existent. Indeed, it is evident that the office has been beset with a tense work environment for many years, and that interpersonal conflicts are rife. Tr. I 29-30, 128-130; Tr. II 128, 133; III 147-8. In short, the evidence is overwhelming that through his years in Billings, respondent had interpersonal conflicts with many co-workers, colleagues and superiors in headquarters, Denver and Billings. Yet,



as mentioned, personality problems were not limited to him.

BRIEFS

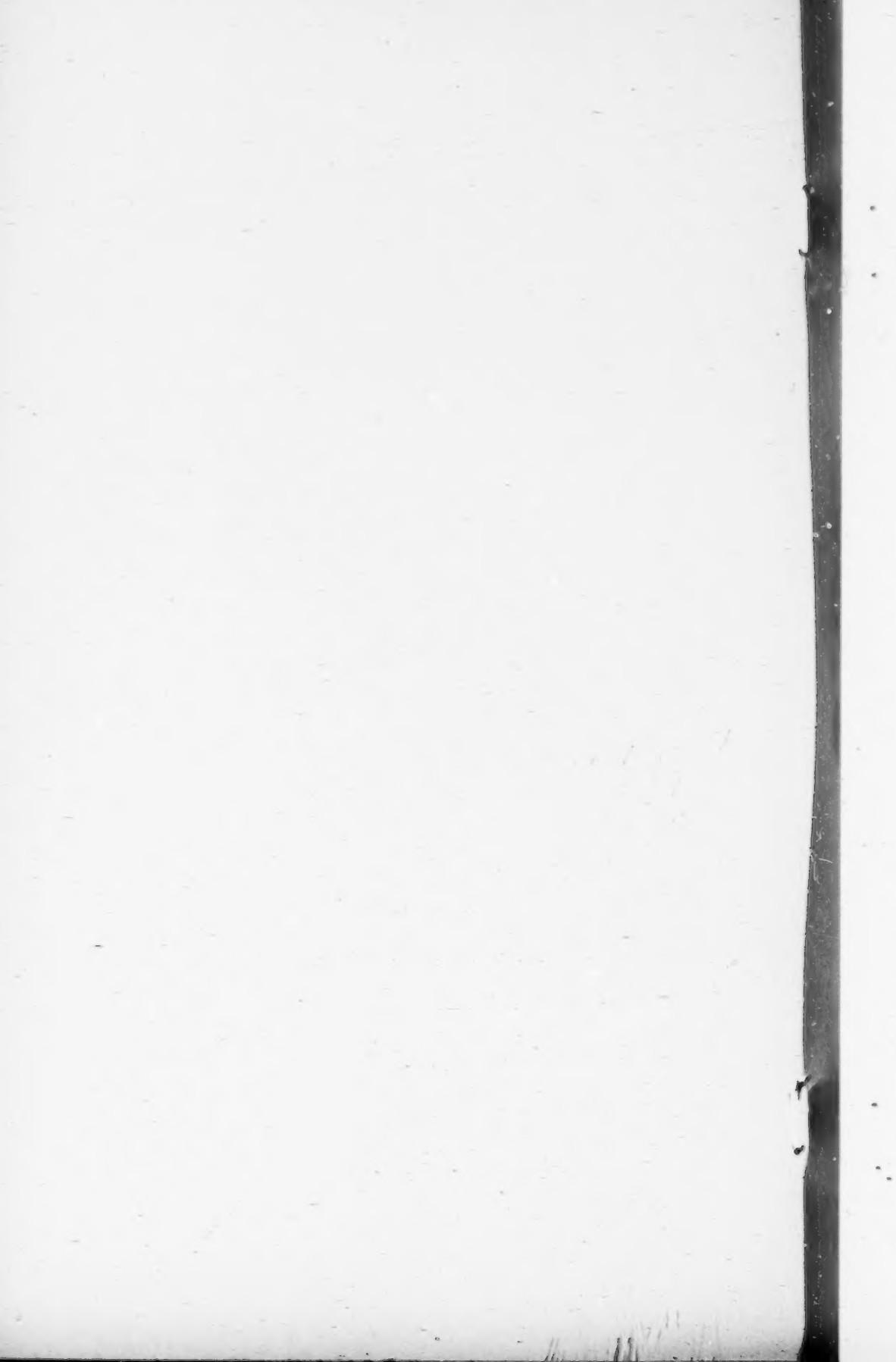
Following the close of the oral hearing in this matter, the parties were given an opportunity to file post-hearing briefs. Both did so. While it was to be reasonably anticipated that both parties would file a suitable factual summary of the proceeding coupled with a recitation of pertinent laws and argument of how the law applies to the facts of record, only the agency followed this procedure. For his part Burris submitted, under the guise of a brief, a laconic statement accompanied by hundreds of pages of letters, memoranda and files of new factual material. Moreover, he even submitted nine rubber stamps - along with their wooden handles - of facsimiles of his signature. In sum, eleven envelopes



of 11 by 14 inches, nearly all crammed full of written materials as aforesaid, were submitted by Burris along with his terse brief.

My review of the materials so submitted shows there are page upon page of materials relating to grievance of up to a decade ago. Some of the files contain several identical copies of the same material. Few, if any, have even general relevance to the issues in question here. None of the materials so submitted constitute argument or matters suitable for a post-hearing brief.

By filing these materials after the close of the hearing, Burris is attempting to place in the record additional facts. This is impermissible. Moreover, these many documents serve only to clutter the record grossly. They are of no aid in resolving the issue in this



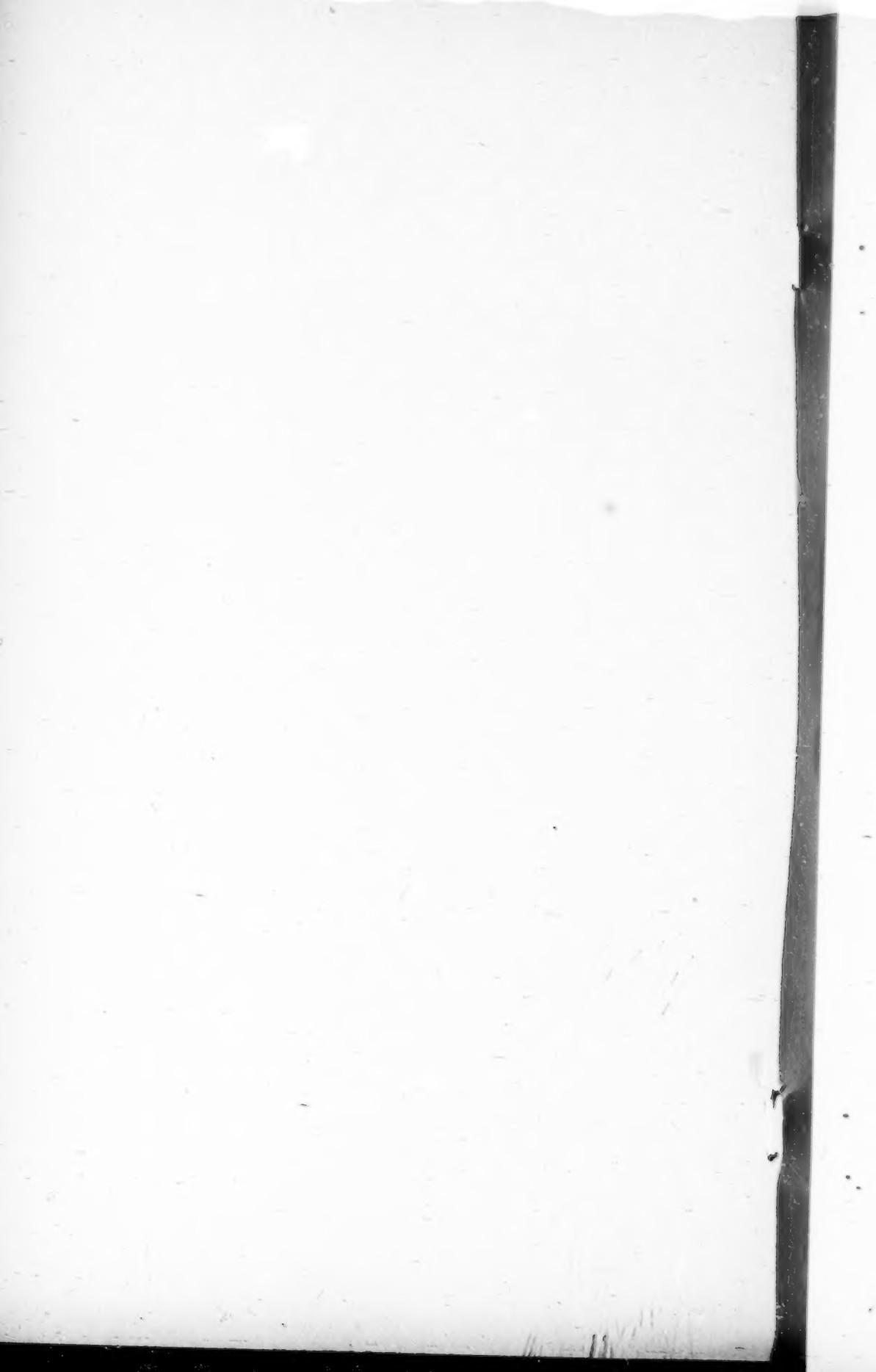
action and to further analyze them is a waste of time. In the circumstances, this submission is wholly inappropriate. The materials are hereby rejected and are being returned by mail to Judge Burris.

THE CHARGES

The complaint contains five counts, some of which have several specifications. For ease of disposition, my discussion will be topically divided according to the counts mentioned. In view of the nature of the complaint, it is evident that in disposing of it a careful balance must be struck between respondent's judicial independence and judicial accountability.

Count One

This first count alleges that respondent engaged in "insubordination, disruption, and unprofessional actions amounting to open contempt and defiance



of administrative authority." Paragraphs 12 through 17 of the complaint set forth the specific allegations in support of Count One. While flouting office administrative procedures which do not interfere with his decisional independence may amount to "good cause" under section 7521, in assessing the contention that respondent damaged the work relationships in the Billings OHA, I am mindful that the disharmony in that office is attributable to several employees, not Burris alone.

Paragraph 12 alleges that respondent refused to engage in meaningful conversation with HOCLJ Hiaring. On November 2, 1984, respondent wrote a memorandum to Frank V. Smith, III, then Associate Commissioner of Social Security for Hearings and Appeals, which stated as follows:

APPENDIX C 000060

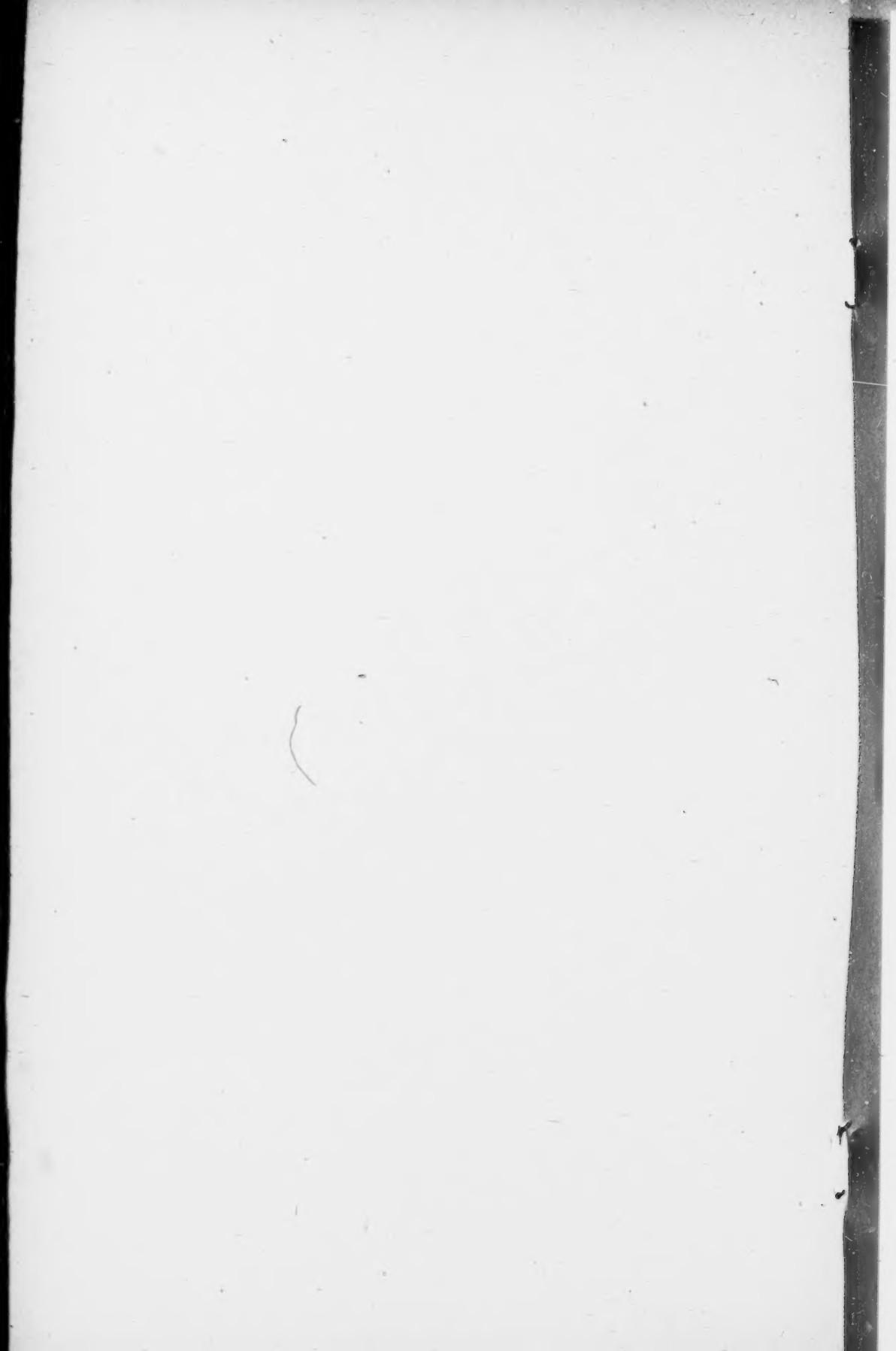


Attached is a memo from Robert Hiaring, The Sneak Thief, ... As of this date, you and your underlings have not responded to my demand for the law/rule/regulation/etc. that requires me to communicate in any fashion with a thief The next time I speak to The Sneak Thief will be in a court of law Frankly, I don't care what The Sneak Thief's "understanding" is about anything.

Complainant's Exhibit (C. Ex.) 1.

Respondent even testified that he has "no use for [CALJ Hiaring]" and does not talk to him. Respondent's Deposition, Volume I (R. Dep. I) at 164, 186. As respondent explained, "I don't talk to him. I listen. If he says, 'Is that right?', I say, 'Hey I don't agree,' or . . . [I] don't say any more to him because I don't want to talk to him." R. Dep. I at 187, 247. On one occasion, respondent told his supervisor, HOCALJ Hiaring, "[I]f you're asking me if I agree, I don't agree, but if you're going to do it, do

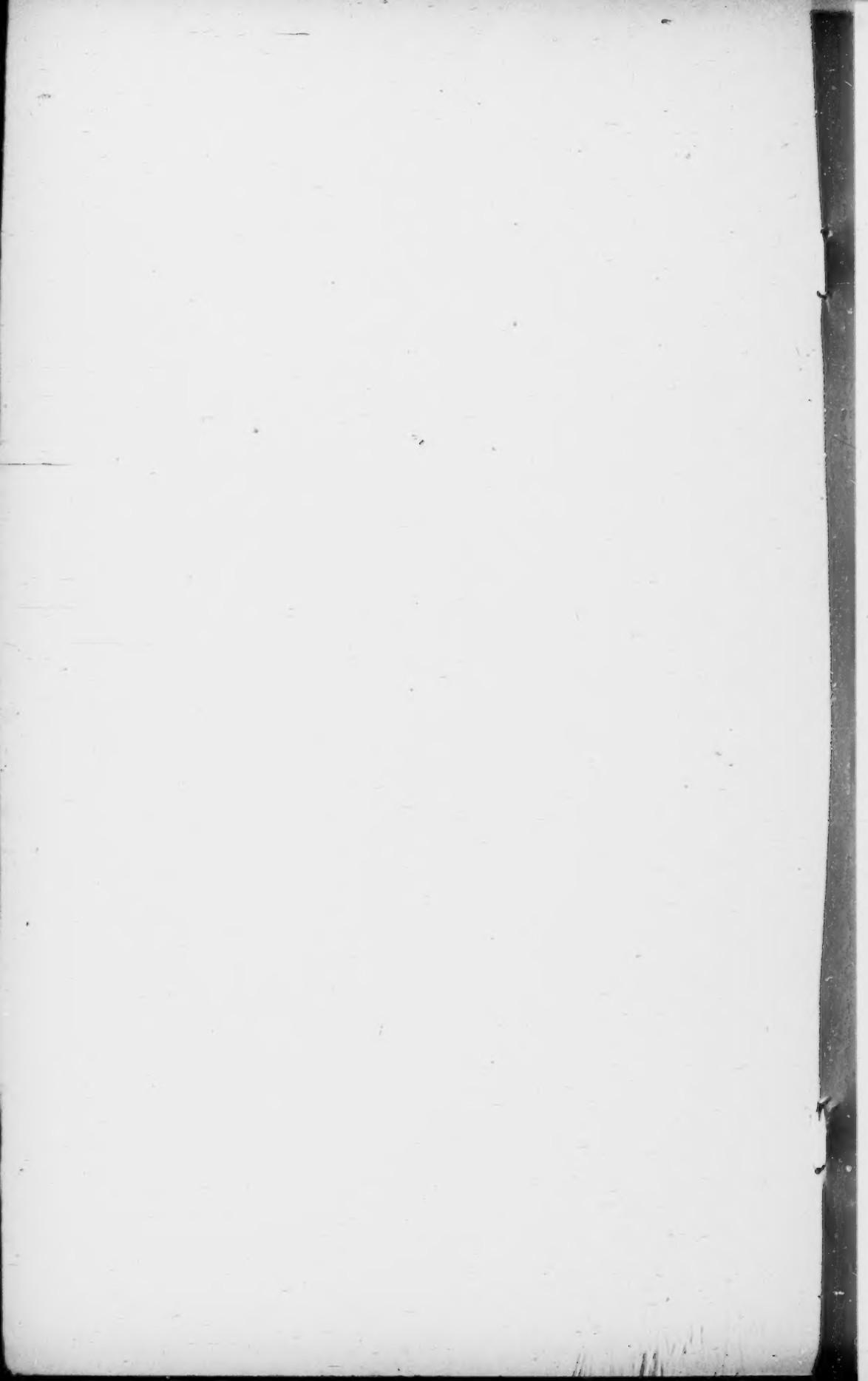
APPENDIX C 000061



it." R. Dep. I at 187. The conversations in question concerned work-related matters such as respondent's case docket.

Respondent's memorandum to Smith and his testimony clearly show that respondent intentionally failed to provide meaningful responses during work-related conversations initiated by his supervisor. Instead, respondent responded to his supervisor in a contemptuous, insubordinate, and defiant manner. Respondent's only apparent justification for his actions was his allegation that his supervisor was a thief. Although the allegation by Burris was not proven,⁵ I find that even if

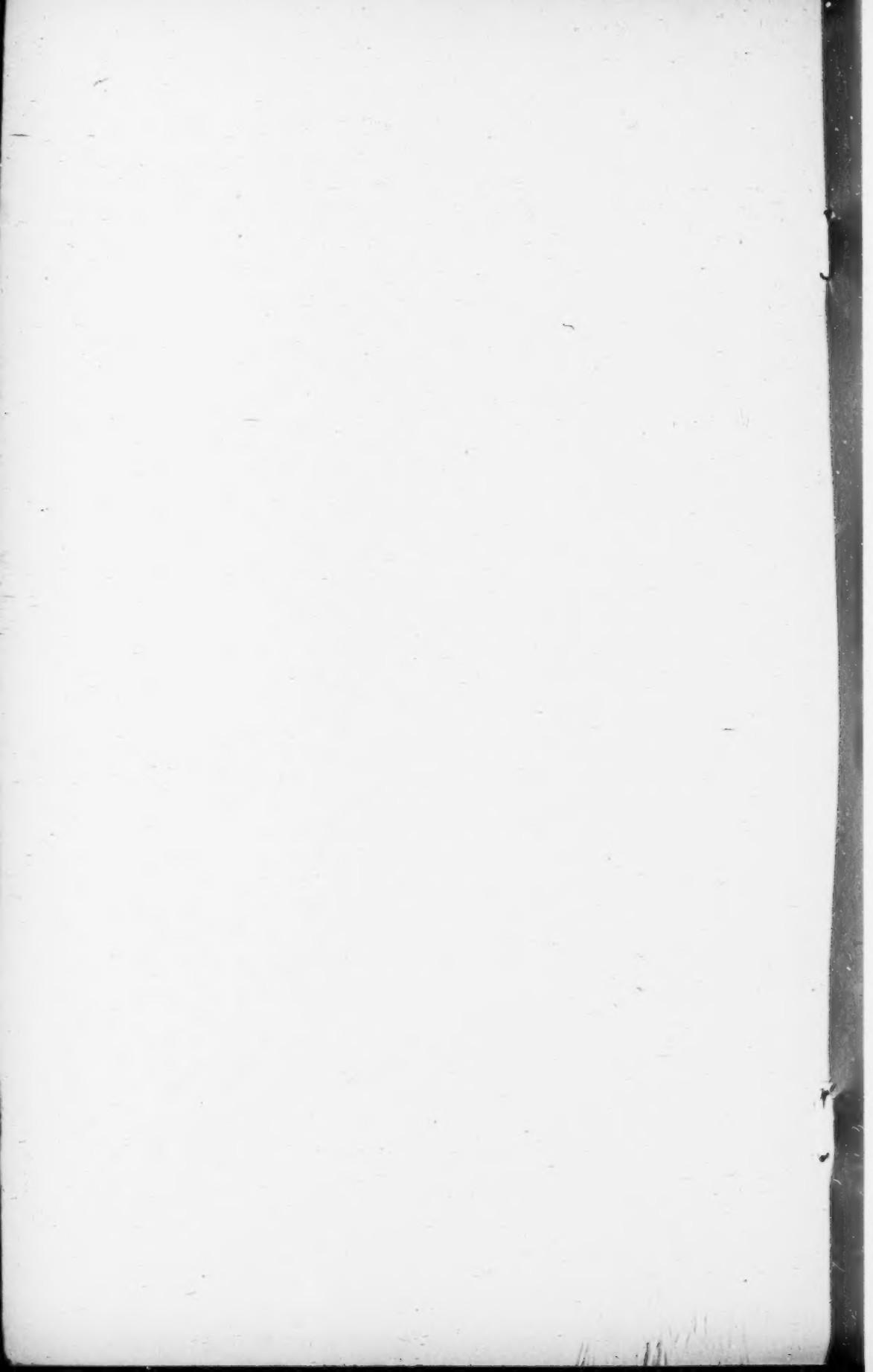
⁵Respondent did not develop most of his defenses by evidence and argument, and thus they were not properly "raised" as issues. See Bacon v. Department of Housing and Urban Development, 757 F.2d 265, 270-71 (Fed. Cir. 1985). However, I have considered all of respondent's



true, such a matter would not justify respondent's refusal to engage in meaningful work-related discussions with his supervisors. The efficient and proper performance of government business requires a minimum degree of courtesy in personal relationships. Matter of Glover, 1 M.S.P.R. 663 (1979). I find the allegations in paragraph 12 to be sustained by a preponderance of the evidence.

Paragraph 13 alleges that respondent refused to follow various office procedures and regulations, and that he directed office employees to perform their work contrary to those procedures and regulations. This paragraph alleges further that, when various matters were

defenses to the extent possible. Nothing supports the notion advanced by Burris that this complaint was sired in retaliation for his whistleblowing.



not resolved to his satisfaction, respondent refused to schedule hearings in his assigned cases.

I will deal first with the allegations involving travel vouchers and the refusal to travel. Hiaring testified as follows regarding those allegations. In August 1984, respondent submitted for approval a travel voucher for a trip on which he had conducted several hearings. The voucher showed that respondent finished his last hearing at 12:30 p.m. on a Thursday, but he didn't return to the office until Friday afternoon. Because respondent claimed per diem expenses for Friday, Hiaring did not approve the voucher. Instead, he requested respondent to either justify why he had waited until Friday to return or amend the voucher. Respondent did neither.



What respondent did subsequently was to bypass HOCALJ Hiaring and send his travel vouchers directly to the agency's central office of approval. At that, the vouchers were returned to Hiaring for his review. Meanwhile, respondent refused to travel to conduct hearings from October 1984 until February 1985. He gave a variety of reasons for that action - lack of money, family visits, and dental and medical appointments. Tr. I 188-96. Respondent admitted that he refused to travel to conduct hearings until the agency paid him \$700 - the net amount which he felt the agency owed him for his travel. He testified that he filed a grievance on that matter, but the agency never issued a decision on it. R. Dep. I 232, 290.

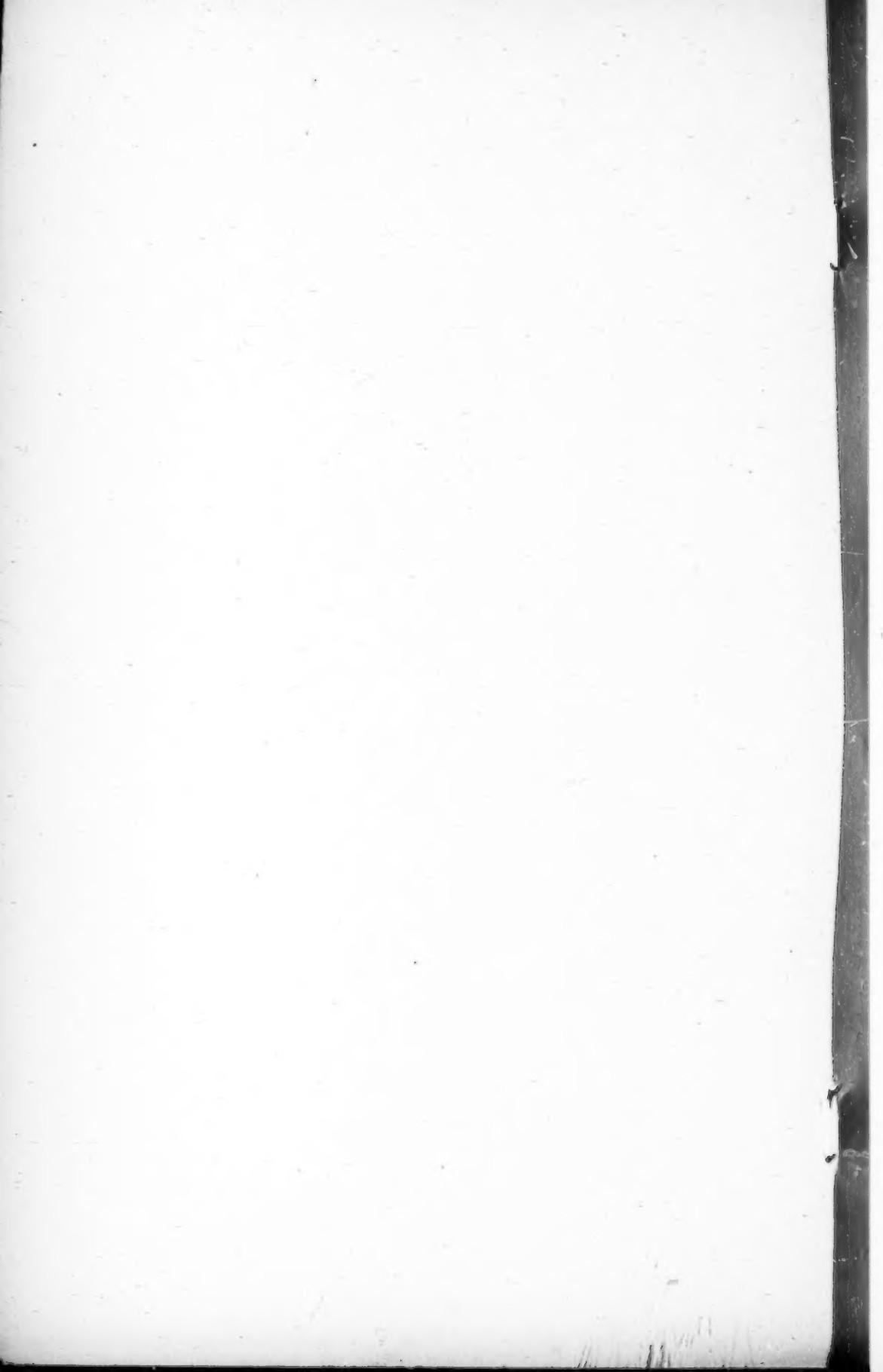
In the spring and summer of 1985, respondent again refused to schedule



hearings in cases which required travel because he believed he should have been assigned cases in different cities. Respondent filed several grievances on this matter. Tr. II, 5-6.

There is ample evidence that respondent was insubordinate by failing to respond to his supervisor's request to either amend his travel voucher or submit a justification for the claim; by refusing to travel to conduct hearings during two periods of time; and by attempting to circumvent his supervisor by sending his travel vouchers directly to the central office. The fact that respondent filed several grievances did not excuse him from the obligation to follow his supervisor's instructions which were valid on their face.

Respondent has not shown that SSA arbitrarily refused to furnish him money

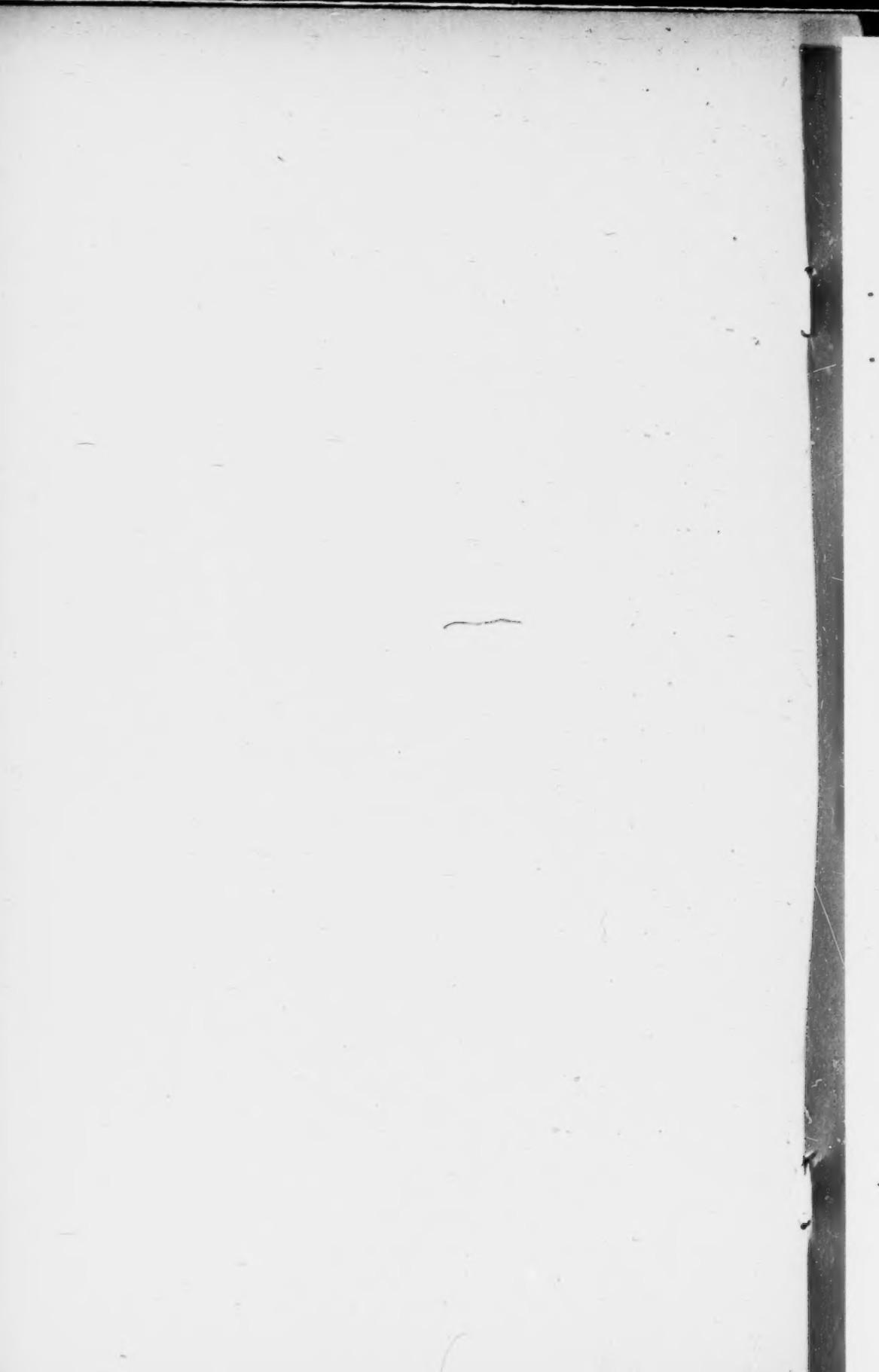


to travel. According to Hiaring's unrebutted testimony, respondent was given a \$1,000 travel advance, and he was eventually paid all but approximately \$150 of the amount he claimed. Tr I 196. Any delay in paying respondent was caused at least partly by his sending the vouchers to the central office instead of processing them through his supervisor. Tr. I 193-94. Respondent has not shown that he simply did not have funds available to pay for his travel pending the agency's payment of his voucher. Nor has he established the validity of his other stated reasons for not traveling-family visits and dental and medical appointments. His refusal was inexcusable.

In this respect, the conduct of respondent was unmistakably disruptive. His cases had to be reassigned to another

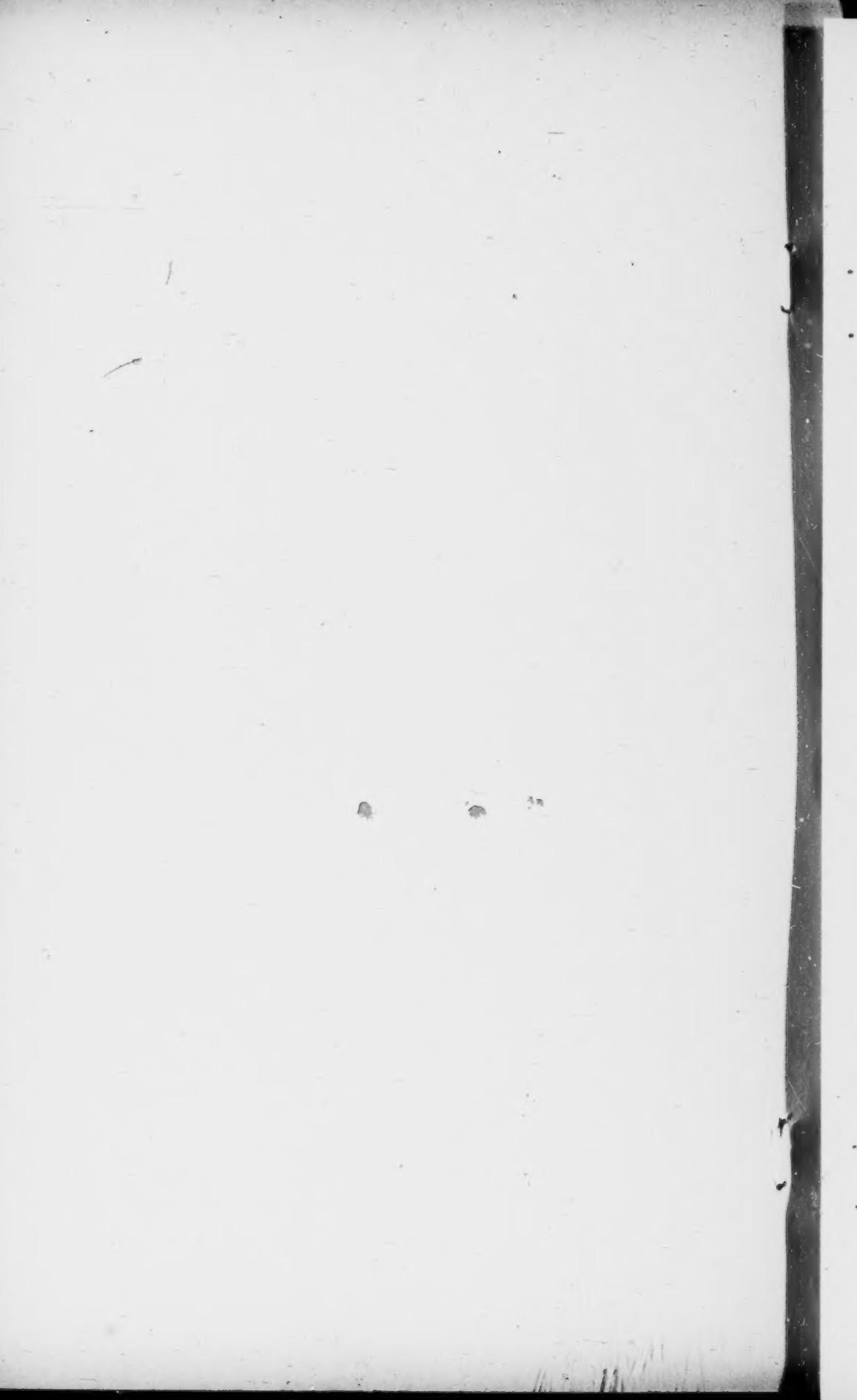


ALJ. Claimants were met with hearing delay. There is no justification manifest for respondent's refusal. He should have scheduled the cases and performed his duties and them sought a remedy elsewhere rather than simply obstinately refusing to travel. See Graag v. U.S. Air Force, 13 M.S.P.R. 296, 299 (1982). And, of course his inexcusable refusal to hear cases constitutes insubordination and "good cause" for disciplinary action. Social Sec. Admin. v. Arterberry, 15 M.S.P.R. 320 (1983), aff'd sub. nom Arterberry v. Dept. Health and Human Services, 732 F.2d 166 (Fed. Cir. 1984) (unpublished opinion); See also Social Sec. Admin. v. Manion, 19 M.S.P.R. 298 (1984). Because the cases assigned to Burris had to be rescheduled, the orderly functioning of the office was impeded, and claimants



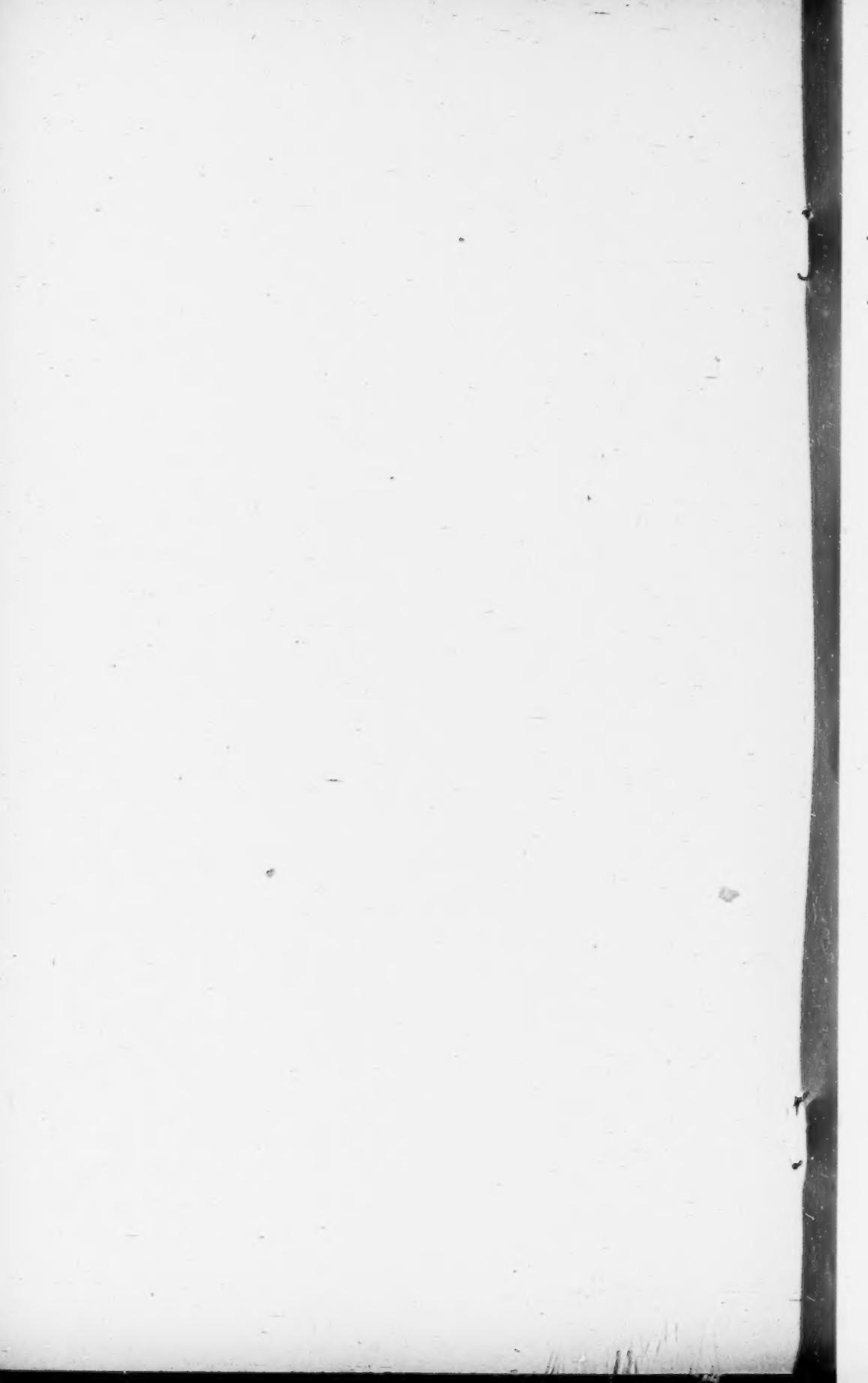
were delayed in having their day in court. Tr. II 4-14. The preponderant evidence supports this part of paragraph 13.

The remainder of paragraph 13 deals with various allegations of improper actions by respondent concerning the processing of office mail, the distribution of ALJ itineraries, and the submission of leave requests. In processing mail, Billings OHA established a procedure whereby all incoming mail was to be opened by the administrative aide. Respondent rejected this procedure and insisted on having all his mail left on his desk unopened by others. The procedure insisted upon by respondent made recordkeeping difficult and created delays in case processing. When management refused to abide by respondent's own wishes -- except where



mail was marked personal and confidential -- he notified claimants that unless they marked incoming mail to him as confidential, their claims might not be properly processed. As a result, further confusion and mail handling delays were occasioned. Tr. I 176-180; R. Dep. II at 217-19. Respondent's practices, contrary to established office procedures, caused disorganization, and created delays and office disruption. His abstinence in this respect amounted to "good cause" under 5 U.S.C. Section 7521 because office procedures adopted by management did not interfere with his decisional independence and were consistent with management's role. Brennan, id.

Whereas Judge Hiaring instituted a procedure whereby the itinerary of an ALJ would only be made public on a need-to-know basis, respondent precipitantly



countermanded this procedure with respect to his own cases without any discussion with his supervisor. This was insubordinate and served to confuse the staff, which was forced to cope with conflicting directives. This part of paragraph 13 is sustained.

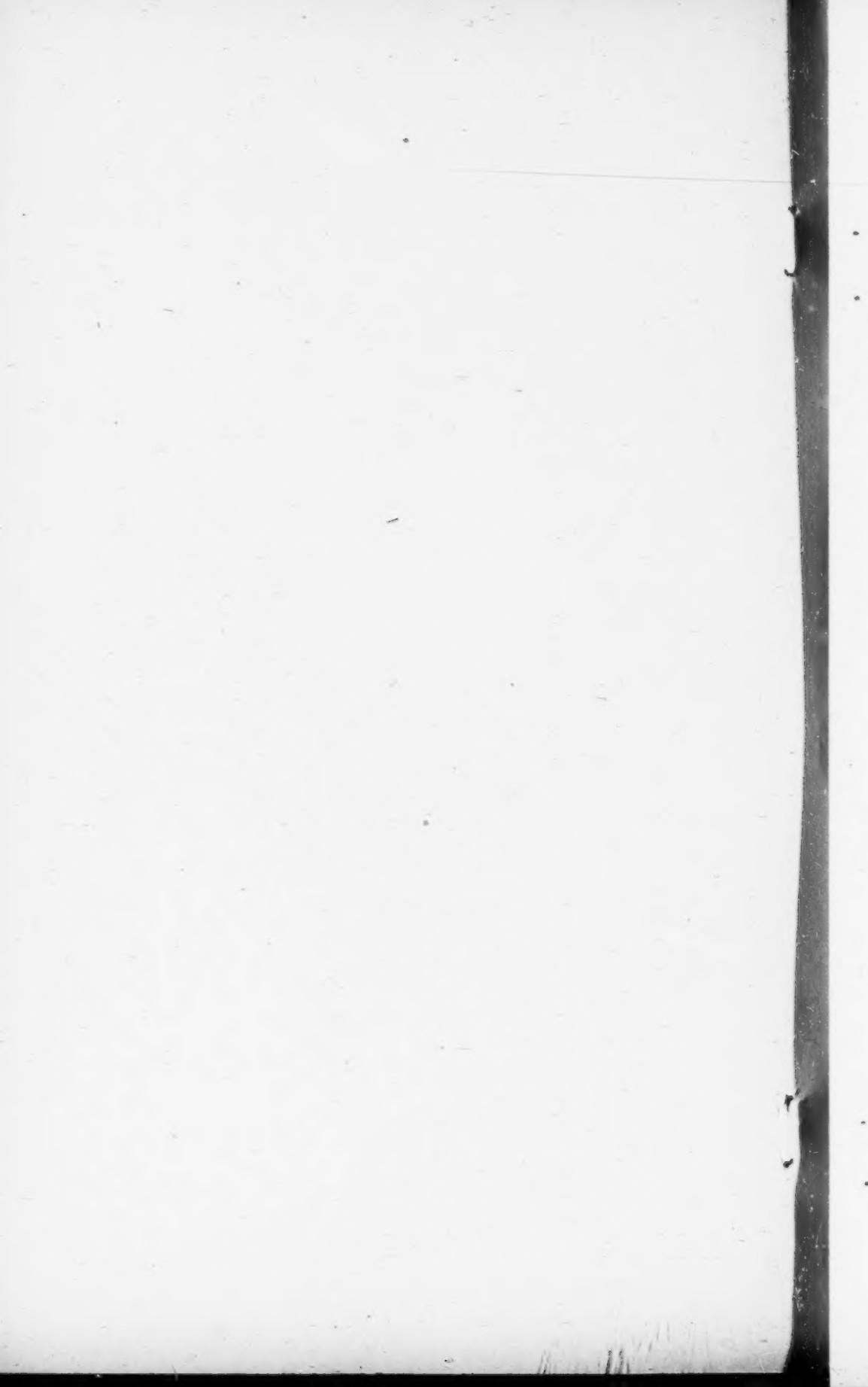
During the time Judge Rucker was ALJIC, respondent absented himself for a week and his whereabouts were unknown. Because he had not obtained advance approval for leave, he was placed on AWOL status. In an apparent attempt to avoid similar problems in the future, respondent sought and received advance approval for lengthy periods of annual leave. However, he came to work on a regular basis during those periods; when he chose not to work on given days, he did not call the office because his absences were covered by this previously



approved "blanket" leave request. As a result, timekeeping became confused.

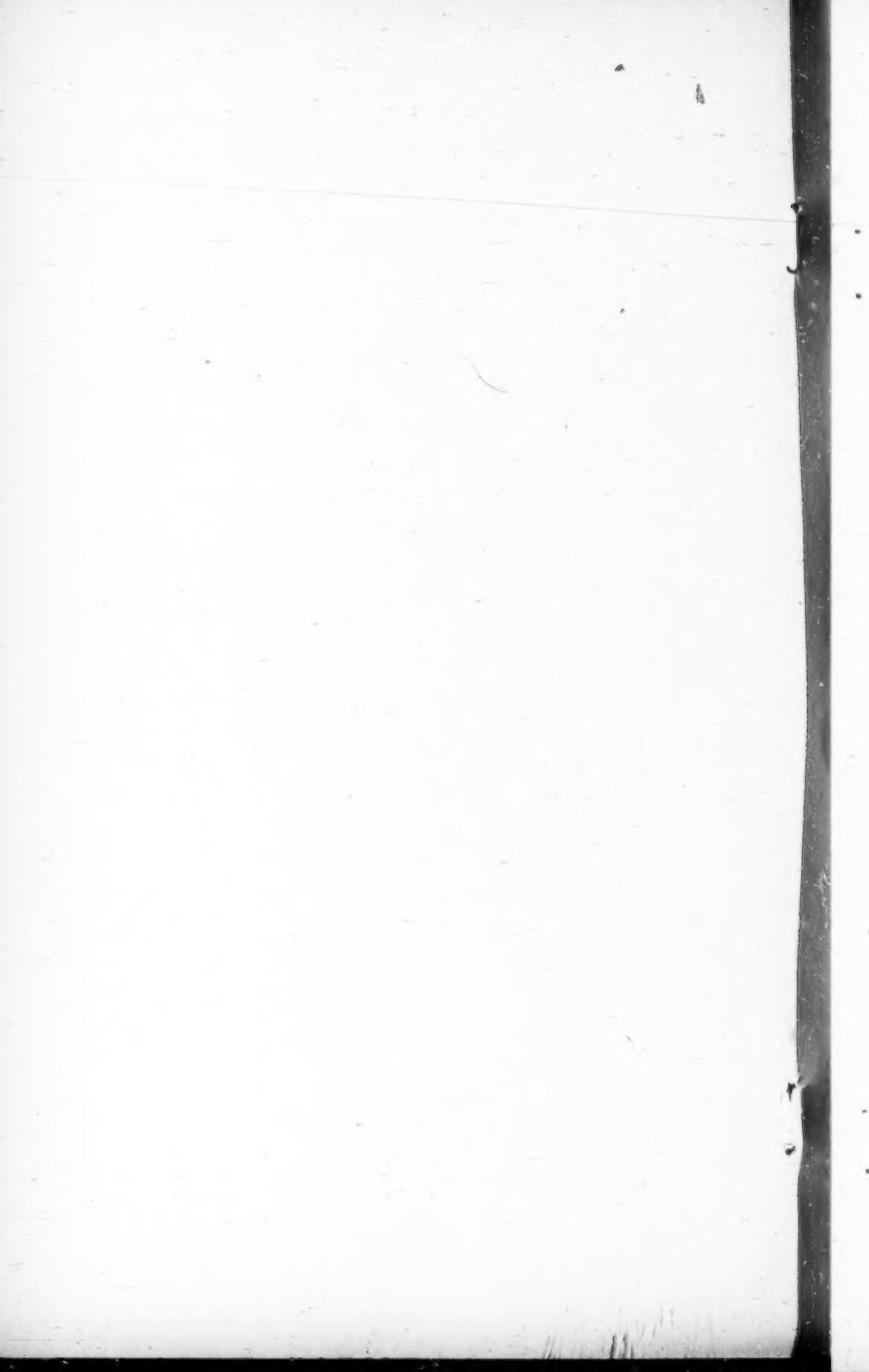
While this ploy might well be viewed as immature, the point is that the authorities had the right to approve or disapprove leave requests, and having done so cannot now be heard to complain of alleged abuses by respondent. This part of paragraph 13 is not sustained.

Paragraph 14 alleges that, in an attempt to undermine Hiaring's authority, respondent involved other employees in his insubordinate actions, damaged relationships among co-workers, disrupted office work, and created a schism in the office. As discussed supra, respondent instructed the staff to perform various tasks, for example, placing unopened mail on his desk and distributing his itineraries, which were contrary to office policies. Tr. I 176-77, 185. As



a result, the staff was faced with conflicting directives, and the work was disrupted. Paragraph 14 is sustained to that extent. However, to the extent that paragraph 14 accuses respondent of creating a schism in the office, it is not sustained. As I have already mentioned, there is ample evidence that the Billings OHA has for some time been in disarray, personality conflicts abounded there, and few, if any, employees were free from being considered a source of the problems in this unhappy worksite.

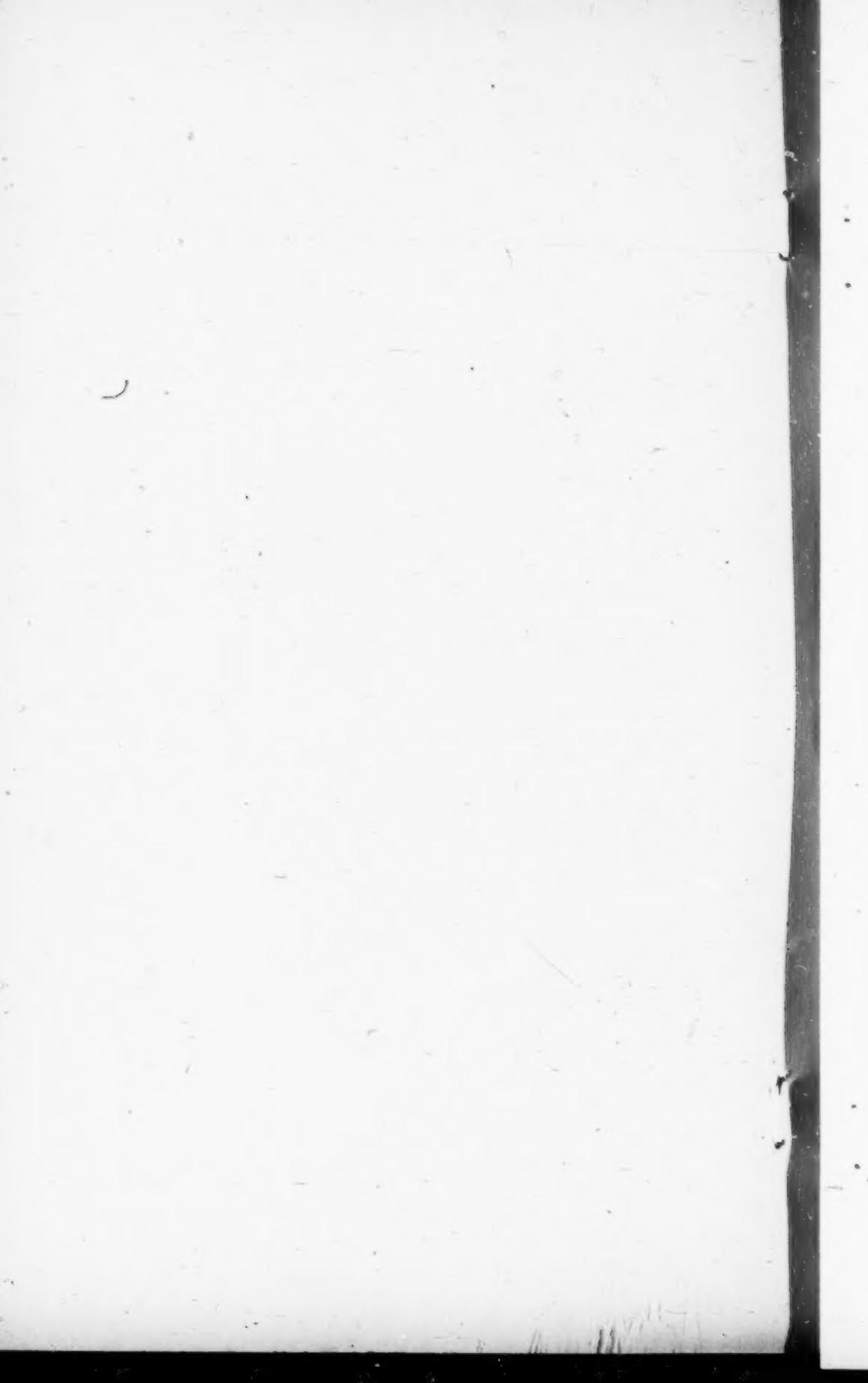
Paragraph 15 alleges that respondent made various unfounded charges against Jane Steadman, the Hearing Office Manager, attempted to discredit her and undermine her authority, and attempted to prevent her relatives from being awarded Social Security benefits. The primary



example of this alleged conduct involves respondent's handling of a claim for benefits filed by Gabriel Reichert - an acquaintance of Steadman. HOCALJ Hiaring and William Burke, a staff attorney in the Billings office, testified as follows regarding the details of this matter. Tr. II 39-57; Burke Dep. 107-113. Respondent did not dispute their testimony.⁶

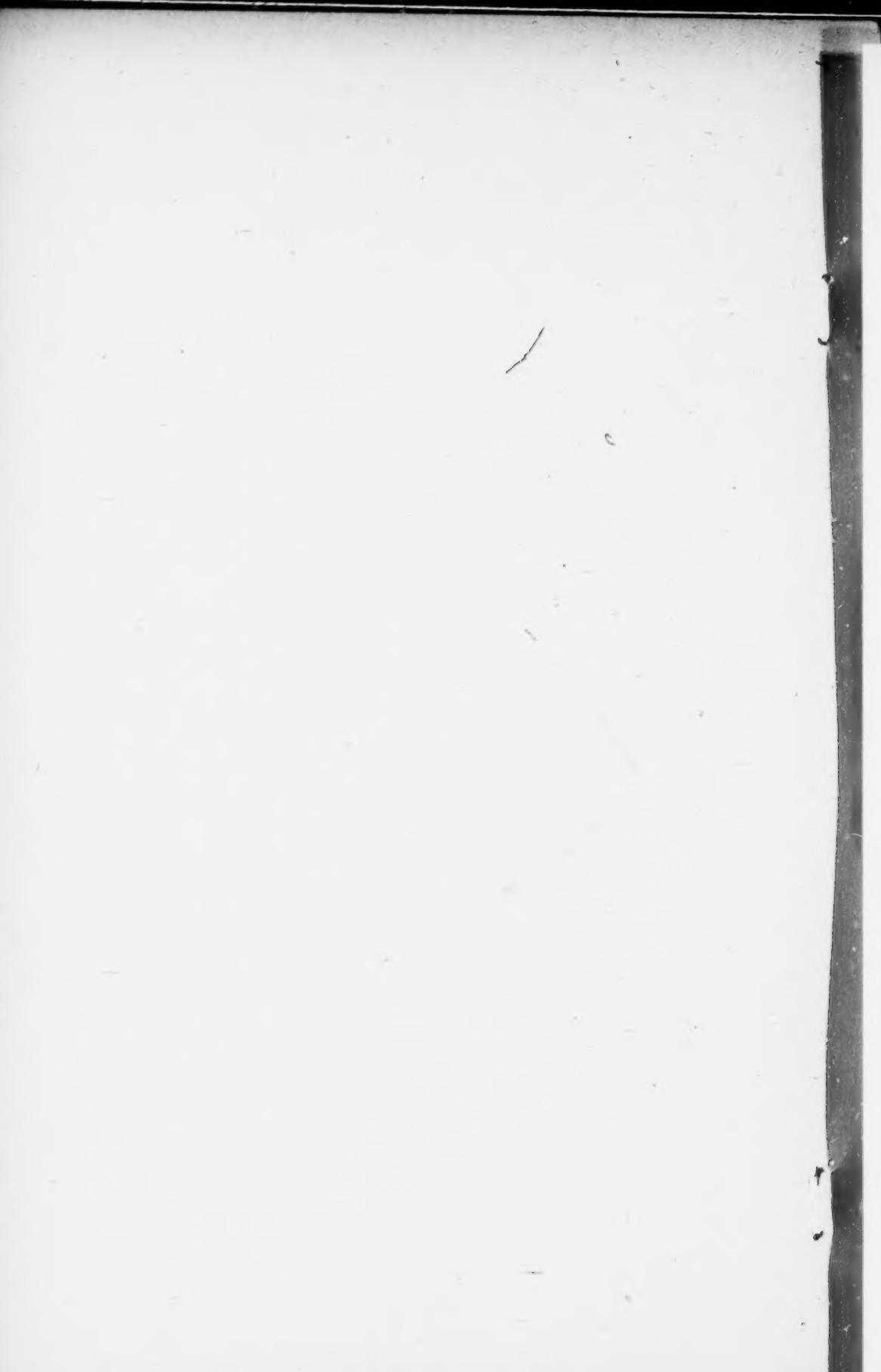
During the Reichert proceeding, respondent suspected that Steadman had improperly communicated with Reichert concerning the case. Respondent had decided to issue a decision awarding benefits to Reichert and had so informed certain staff members. However, he gave

⁶Indeed respondent never took the stand to deny any of the allegations of misconduct by him. Thus an inference adverse to him may permissibly be drawn. Social Security Admin. v. Glover, 23 M.S.P.R. 57, 71 (1984).

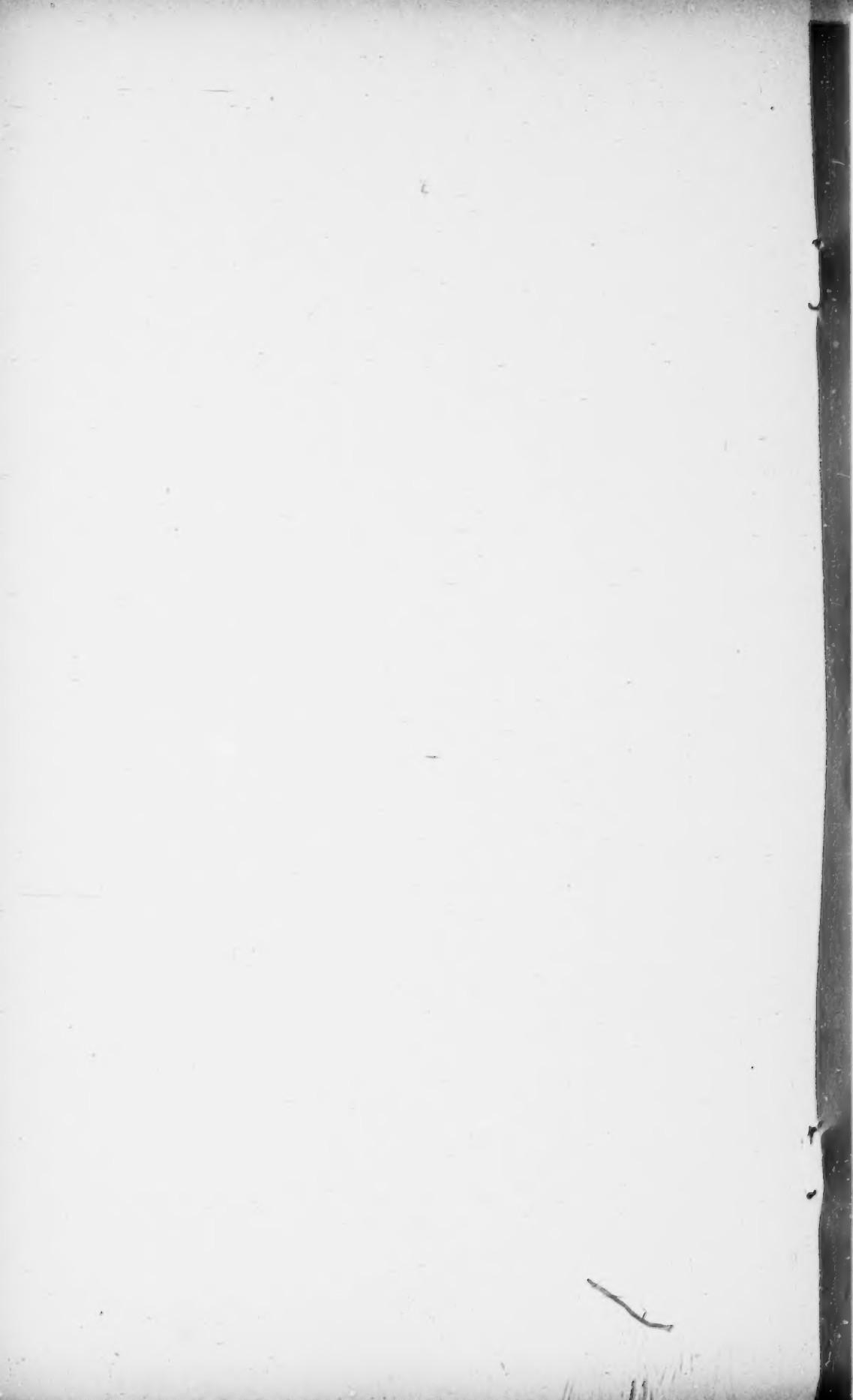


written instructions, which he apparently intended to be seen by Steadman, that a decision should be drafted denying benefits. He did so because he felt Steadman was "meddling" in the case, and he wanted to "set her up" and "bait" her to tell Reichert the outcome of his case prior to issuance of the decision. Later, respondent convened a supplemental hearing at which he questioned two staff members regarding Steadman's conduct in the case.

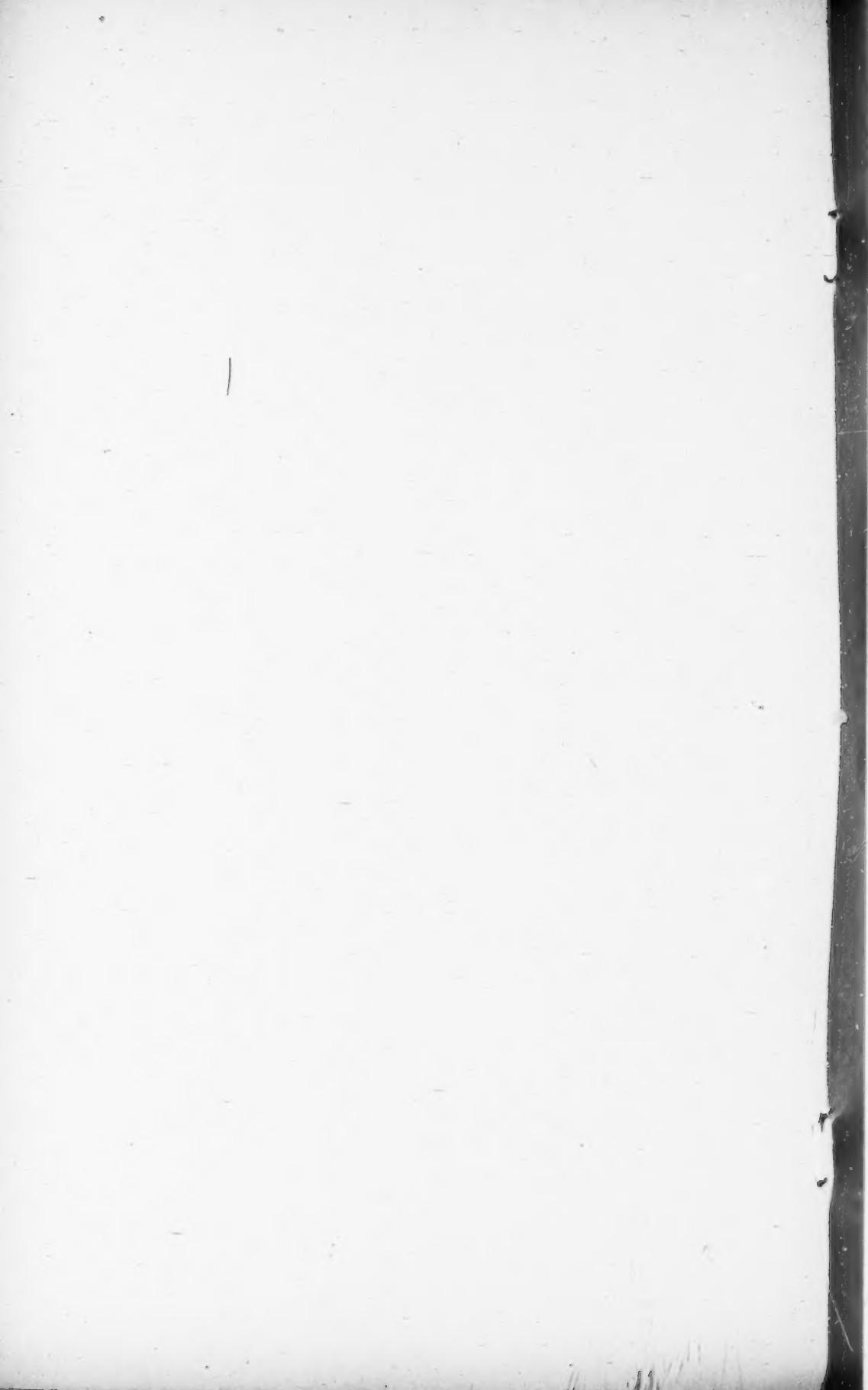
Respondent contends that his action of "setting up" Steadman was appropriate and was within his authority as an ALJ. I disagree. As an ALJ assigned to the Billings office of OHA, SSA, respondent was authorized to take appropriate actions necessary to the adjudication of claims for benefits. Respondent does not contend that the issue of the



appropriateness of Steadman's actions in the Reichert's case had any bearing on the issue of Reichert's entitlement to benefits. In fact, respondent had already decided to award Reichert benefits before he began his "investigation" of Steadman. If respondent felt Steadman's actions were improper, he should have advised her supervisor, Hiaring. I find that respondent's actions in this matter were not within the proper scope of his duties as an ALJ, and that therefore, respondent's judicial independence does not render him immune from the allegations in paragraph 15 based on those actions. Respondent clearly abused his quasi-judicial powers by unauthorized investigation of the employee. I find paragraph 15 to be sustained to that extent.

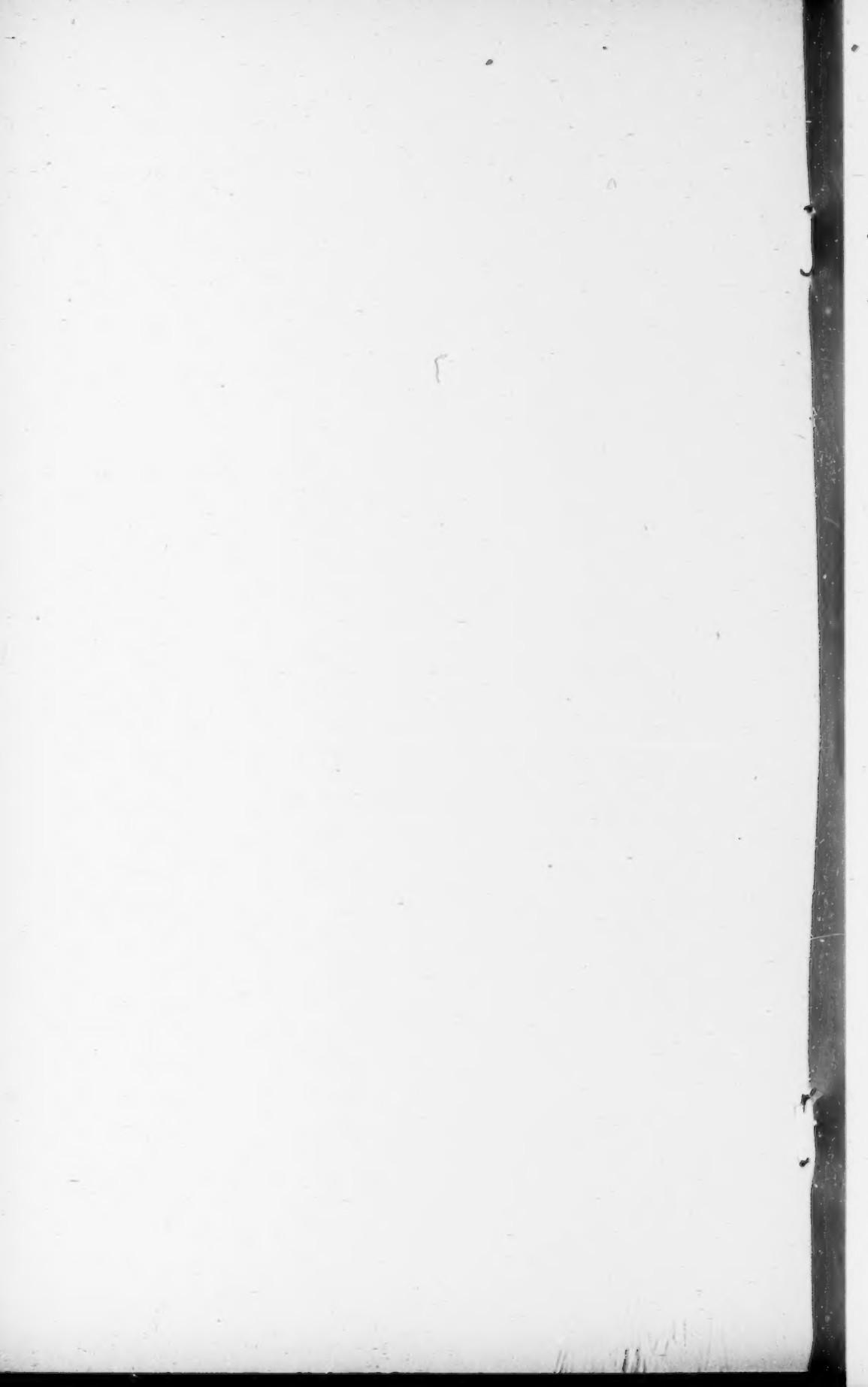


The remaining allegations of paragraph 15 (making unfounded charges against Steadman, attempting to discredit her, undermine her authority, and preventing her relatives from being awarded Social Security benefits) are not sustained. As discussed supra, the entire Billings office was beset with personality conflicts, name-calling, and rumors. There was evidence that even Hiaring made a derogatory remark about Steadman. Burke Dep. 106. Although respondent filed grievances regarding the awarding of benefits to Steadman's relatives, his allegations were not directed against Steadman. Rather, he contended that OHA management officials acted improperly by choosing the ALJs who would adjudicate the claims of Steadman's relatives instead of assigning the cases in rotation. Grievance File, vol. 3 at



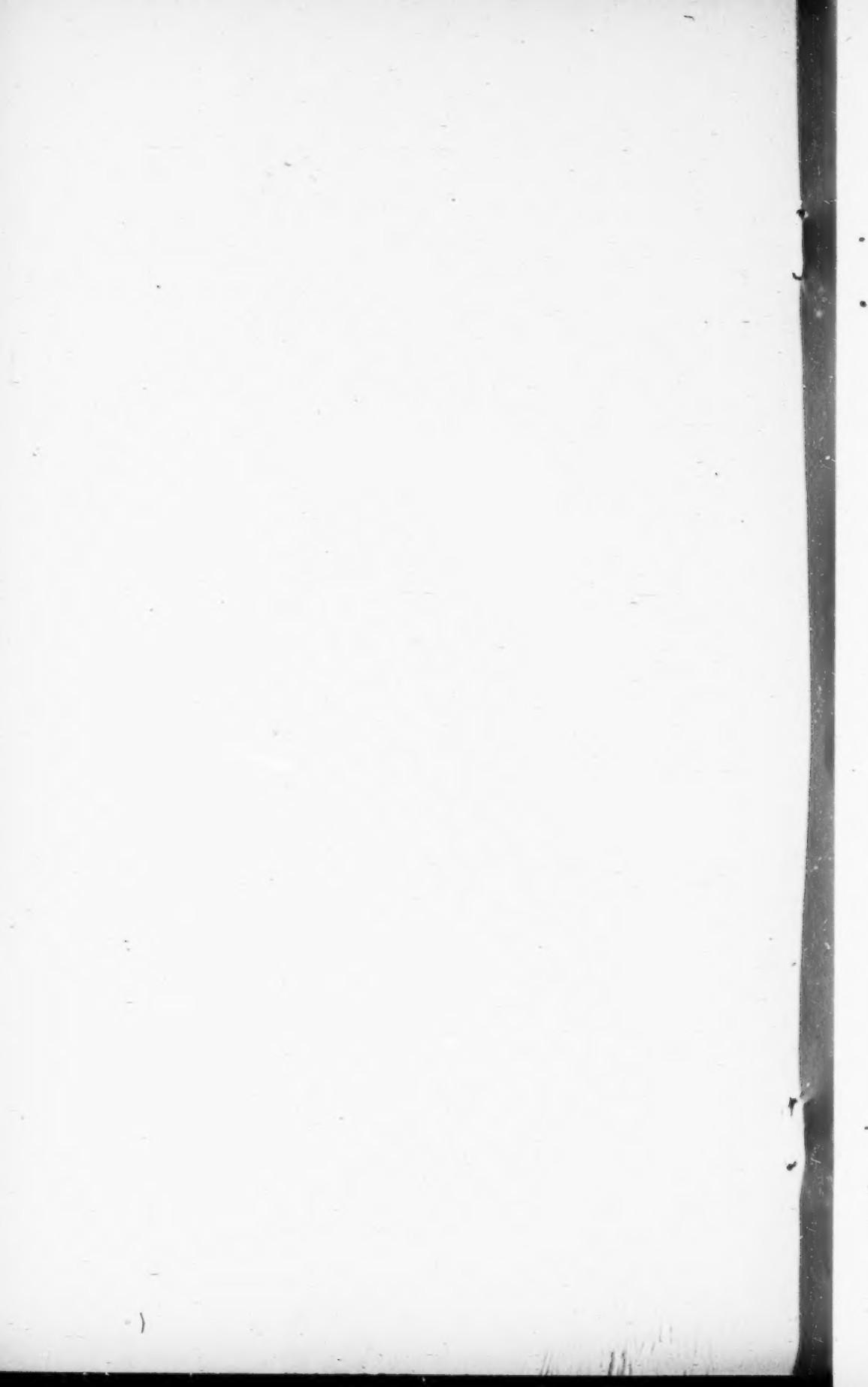
34-60, vol. 7 at 76-138.

Paragraph 16 alleges that respondent made several unfounded charges regarding Hiaring's reputation and integrity in order to embarrass him and undermine his authority. The first incident involves respondent's allegation that Hiaring stole his credenza and \$114 in cash which was in the credenza. According to Hiaring, Tr. II 23-35, and respondent, R. Dep. I 178-196, respondent placed a new credenza in his office without knowing it had been ordered for Hiaring; however, Hiaring directed that it be moved to his office. After the move occurred, respondent filed a complaint with the local police alleging that HOCALJ Hiaring had stolen his credenza and cash. After investigating the allegations, the police concluded that no crime had been committed. However, as discussed



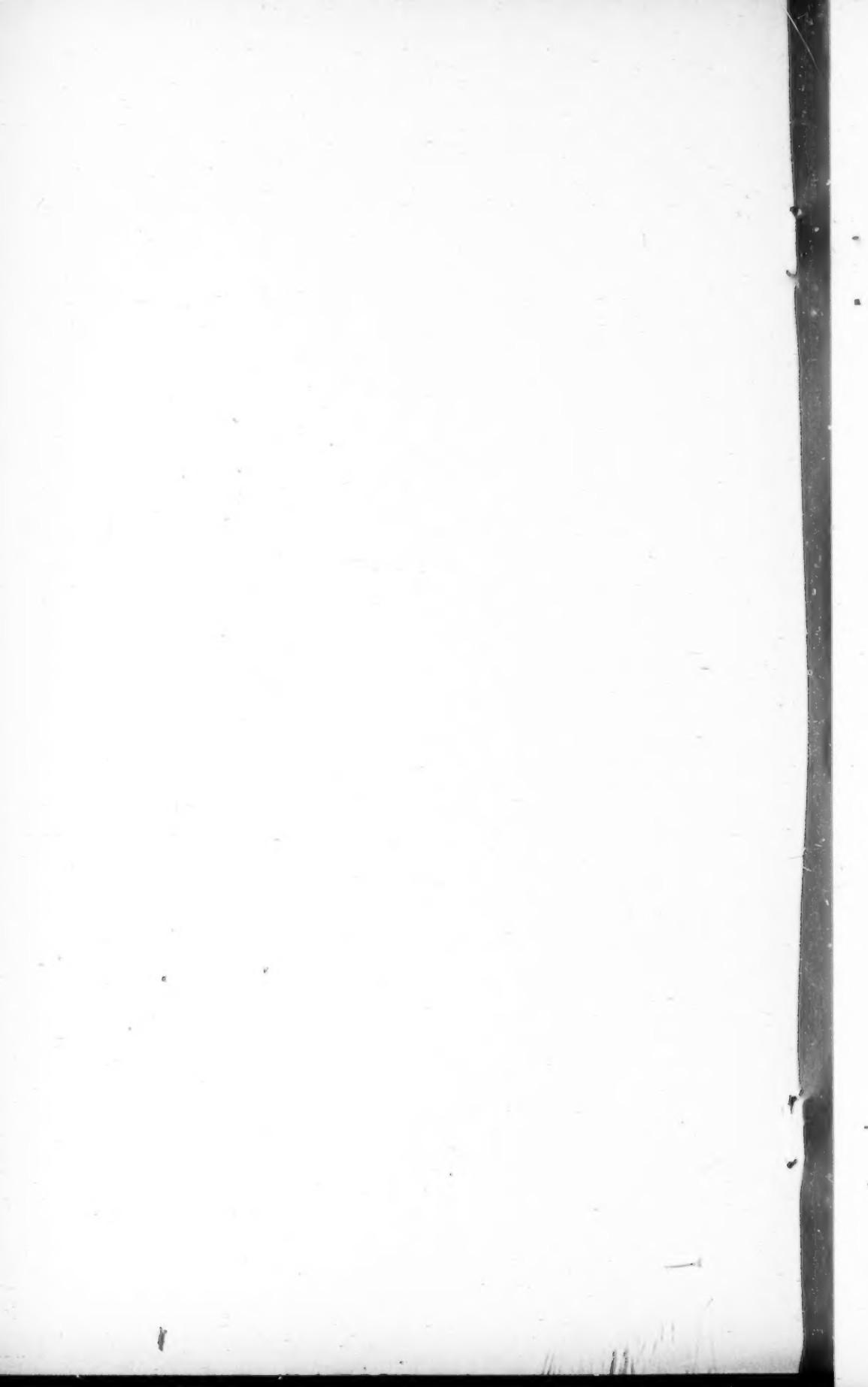
elsewhere in this decision, following this incident respondent began his relentless accusations that Hiaring was a "sneak thief" and tagged him with the derogatory label "the credenza kid" in various oral and written communications.

Respondent, like any other person, certainly had a right to complain to the police if he believed his money was stolen, so I do not find that aspect of paragraph 15 to be sustained. However, as the credenza in question belonged to the federal government, respondent could not have reasonably believed that Hiaring committed a crime by moving the credenza from one office to another. Thus, I find that respondent's complaint to the police about the credenza was motivated by a desire to impugn his supervisor's reputation, rather than by a desire to report the commission of a crime to the



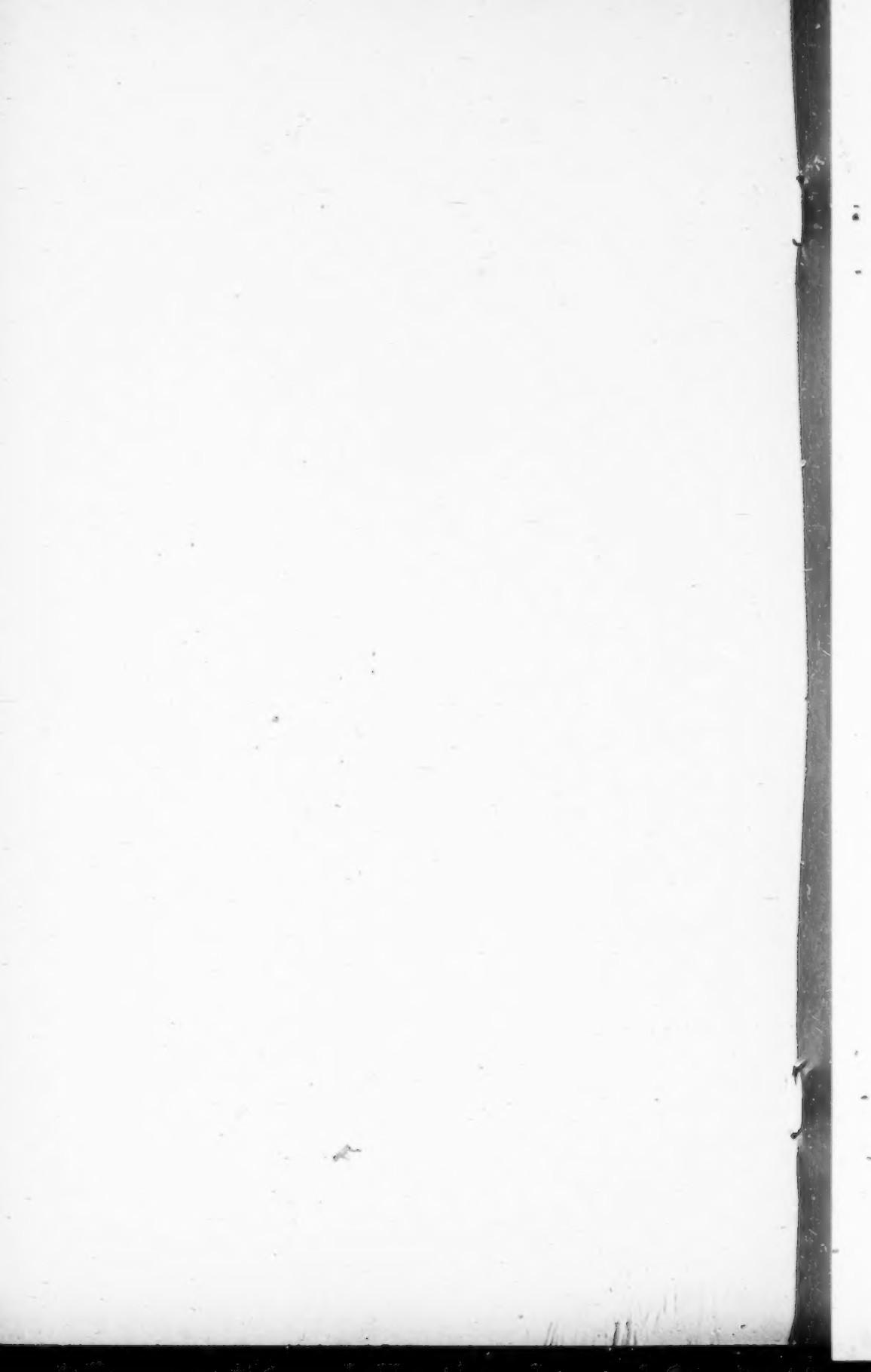
proper authorities. It was patently frivolous for, at most, Burris in his own mind convicted Hiaring of thievery on the basis of no concrete evidence. Further, regardless of any possible merit to his allegations of theft of his cash and the credenza, respondent acted insubordinately by publicly accusing his supervisor of being a "sneak thief" and abusively calling him "the credenza kid." I find those aspects of paragraph 15 to be sustained by the preponderant evidence.

The other incident involved in paragraph 15 concerns respondent's execution of an affidavit in support of an attorney's motion to disqualify Hiaring from hearing certain cases. The attorney, Lloyd Hartford, frequently represented claimants for Social Security benefits as well as a Billings Hearing



office employee, Lois McConnell, in a dispute with HOCALJ Hiaring on an employment matter. Hartford alleged that it was a conflict for Hiaring to decide cases involving claimants represented by Hartford while the dispute involving McConnell was pending. Respondent stated in an affidavit which accompanied the motion for disqualification that Hartford had requested him to testify in support of the motion, that he declined to do so, but that he agreed to respond in the affidavit to several interrogatories propounded by Hartford regarding the dispute involving McConnell. Tr. II 15-20; Ex. C-8.

I do not feel this aspect of paragraph 15 to be sustained. Respondent's affidavit is not written in an insubordinate tone concerning his supervisor, and it does not contain any



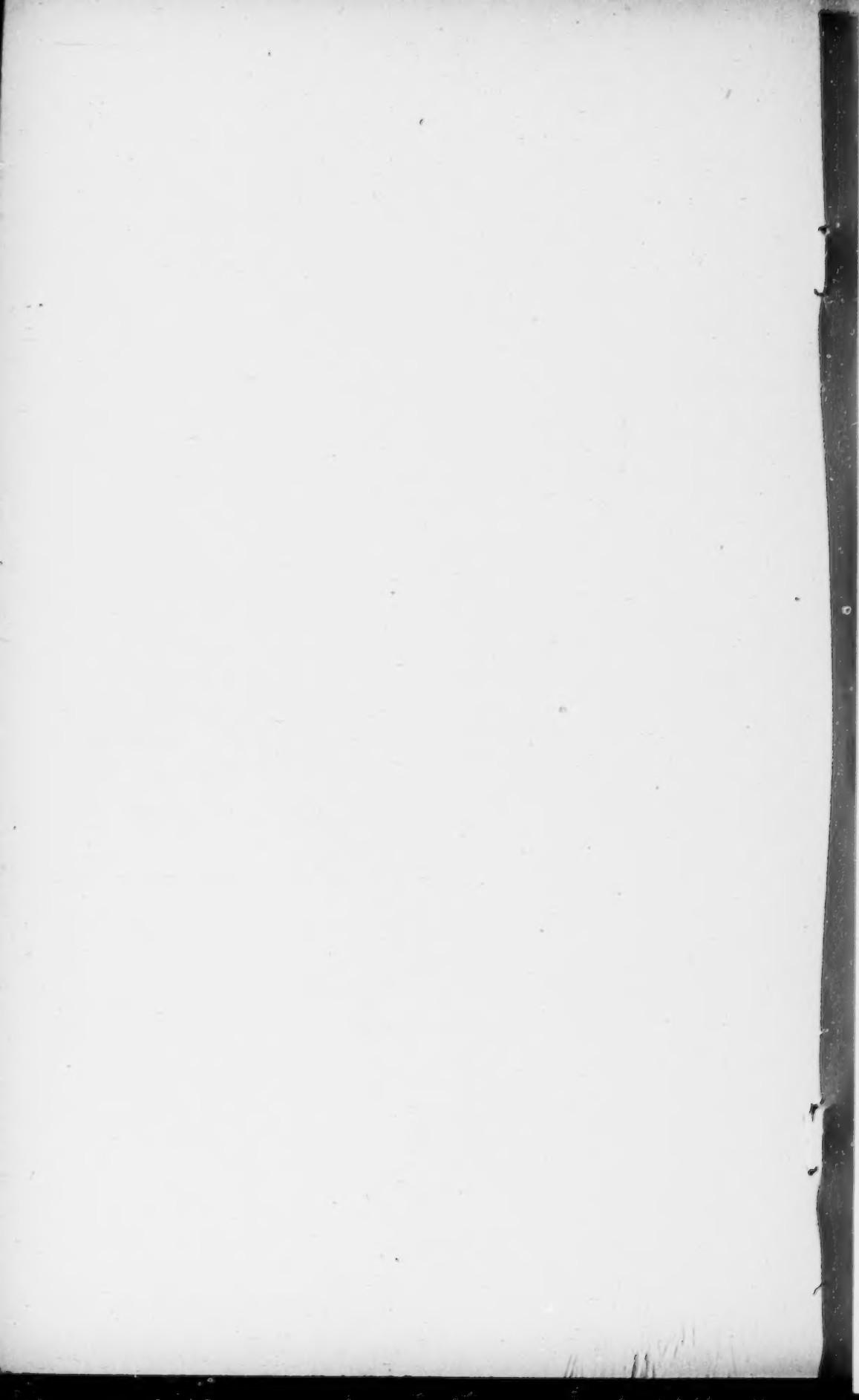
of the derogatory terms which respondent included in other communications concerning his supervisor discussed elsewhere in this decision. The affidavit reflects that respondent's purpose in furnishing the affidavit was not to defame his supervisor but rather to bear witness to events having a bearing, on the motion for disqualification. I see no reason why respondent's status as a subordinate of Hiaring barred him from presenting evidence in the proceeding. Although Hiaring disagreed with respondent's version of certain events described in the affidavit, there was no evidence that respondent intentionally submitted a false affidavit in order to impugn his supervisor's reputation and integrity in this matter.

Paragraph 17 alleges that respondent

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was insubordinate toward his second-level supervisor, Regional Chief ALJ Rucker. This allegation is supported by respondent's repeated defamatory references to Judge Rucker in various correspondence. For example, respondent stated in a grievance tot he former Chief ALJ of OHA that, "As the grievant, I think I am entitled to act as fraudulently as you and Rucker." Ex. C 22 at 340. In another grievance he referred to Judge Rucker as "Rucker, The Liar." Ex. C 22 at 356. These grievances did not pertain to matters of public concern; rather, they dealt with matters such as respondent's removal as ALJIC, lunch breaks, rewards, and preselection. Thus, respondent's comments are not entitled to constitutional protection. See Mings v. Department of Justice, 813 F.2d 384, 387-



89 (Fed. Cir. 1987). I find paragraph 17 to be sustained.

Count Two

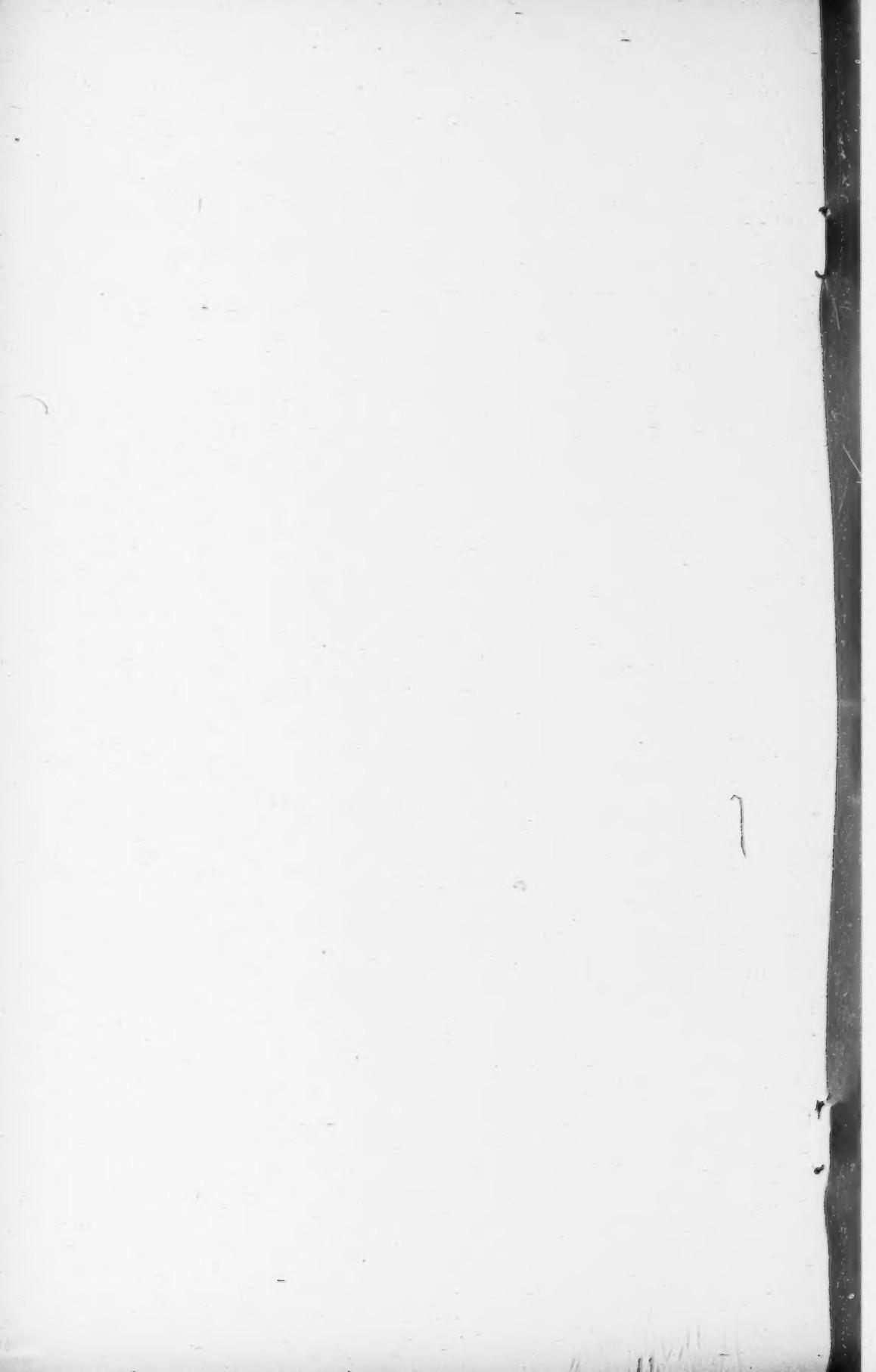
Count Two alleges that respondent maliciously used the agency's grievance procedures in order to be insubordinate and to engage in discourteous and abusive language. Underscoring this charge is complainant's insistence that since respondent was removed as ALJIC in 1984, he has improperly used the HHS grievance procedure as a part of his continuing course of open contempt and outright defiance of OHA management authority and as a vehicle for impugning and maligning OHA management officials.

Count Two also charged that respondent has abused the grievance procedure to engage in discourteous and abusive language, that is to harass OHA and its officials rather than to attempt



to obtain relief for alleged wrongs. For the reasons to be mentioned, I find this charge sustained in the main by the preponderant evidence. His virtual avalanche of complaints has nearly buried those responsible for processing his grievances. Their tone reeked of calumny.

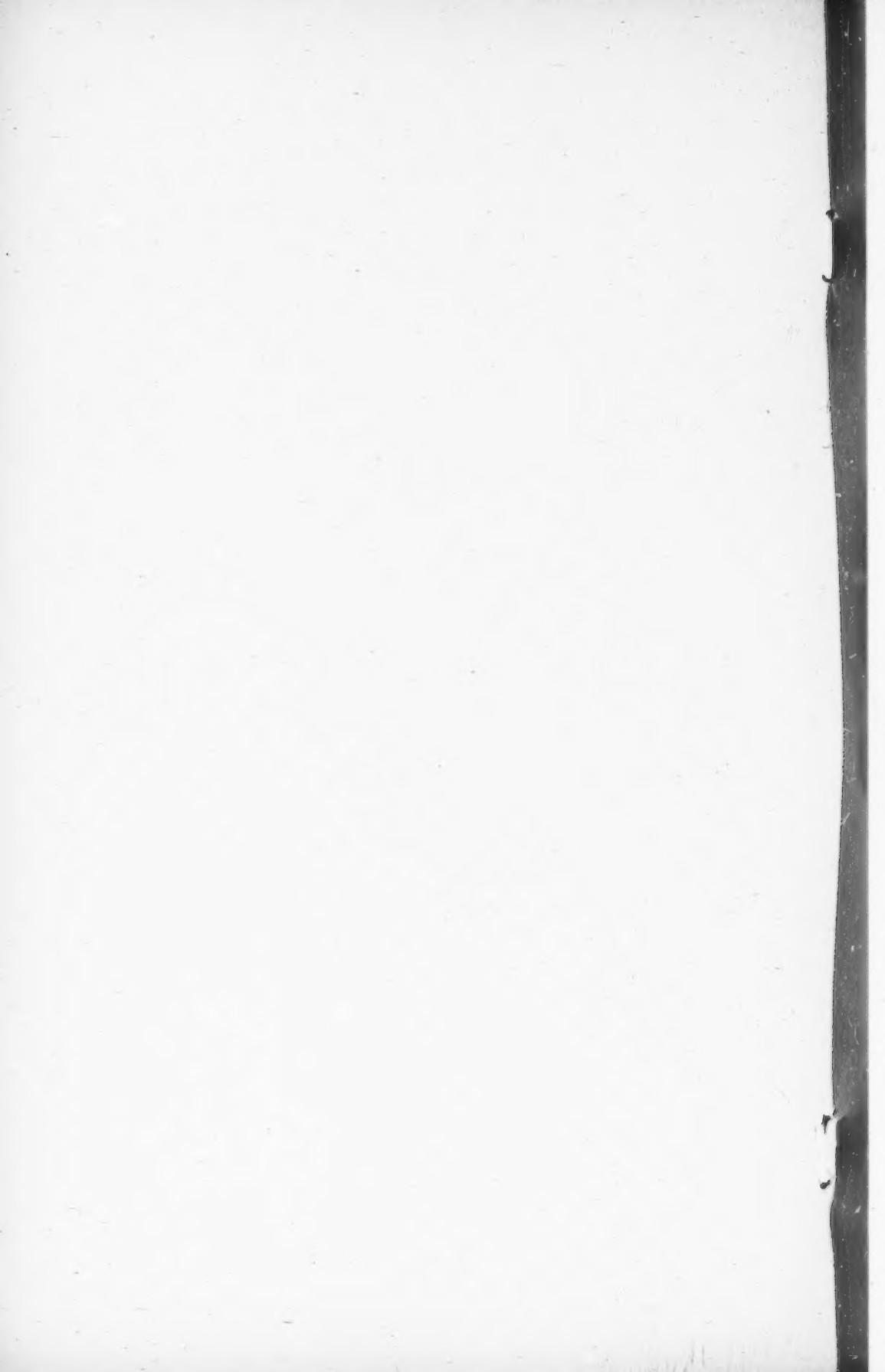
It is vividly portrayed throughout this record that respondent was quick to file a grievance for nearly every slight he perceived, be it actual or imagined. As time went on it was apparent to management that it was likely - if not inevitable - that respondent would give virtually every management decision. The sheer number of these filings and their cumulative size suggest that respondent was nearly engaged in a separate occupation of filing complaints as part of his defiant resistance to management



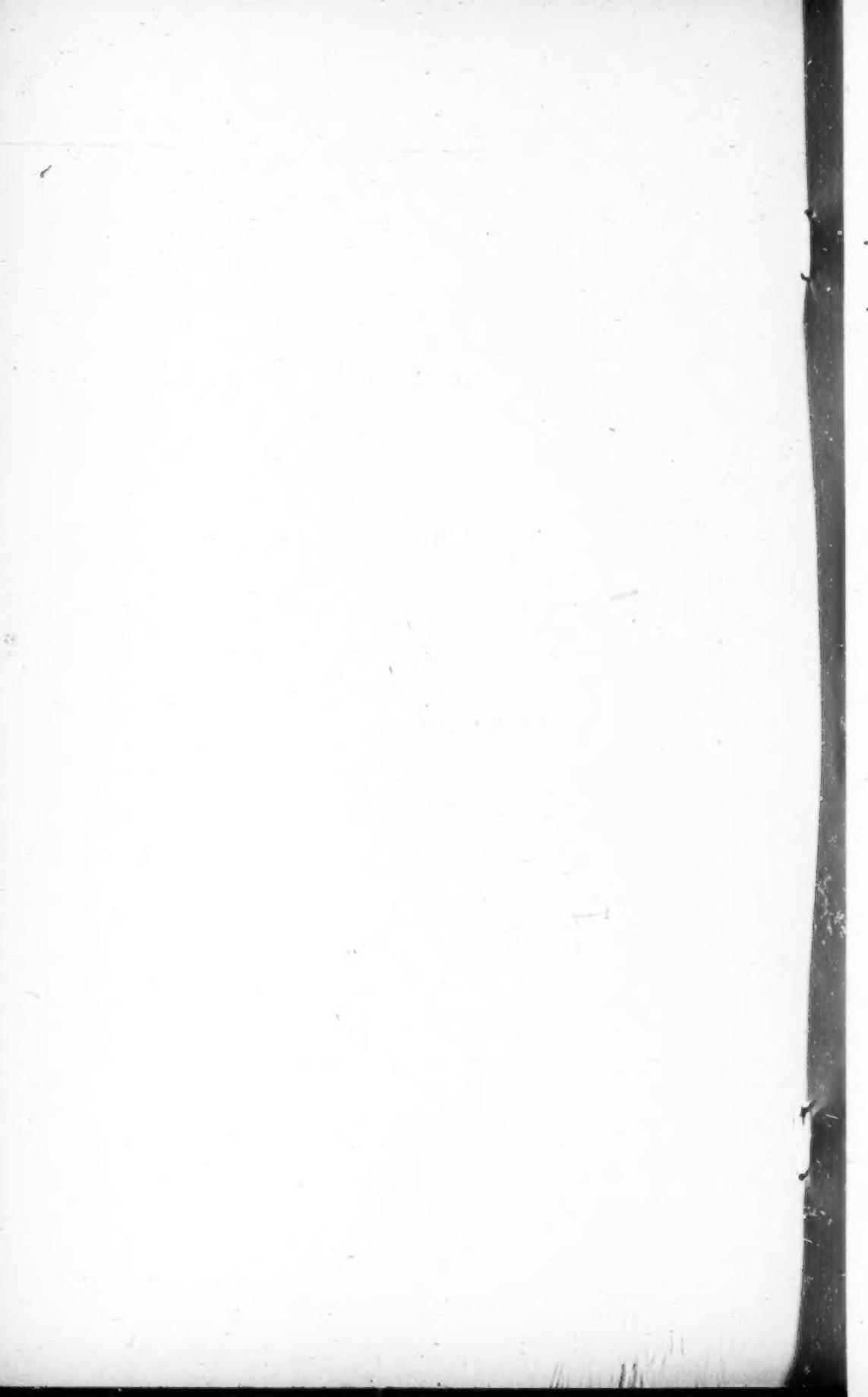
initiatives. This respondent has been shown to be intransigent and seems bent upon opposing legitimate management decisions at all levels.

In support of Count Two, the agency proffered eight volumes of grievances filed by respondent between March 1984 and June 1986. While I ordered⁷ the agency to select a sampling -- rather than bury the Board under a comparable avalanche -- I note for the record that in a period of some 16 months, respondent filed more than 100 grievances. R. Dep. I 125. This grievances file contains eight volumes and totals more than 2,000 pages. So prone has Burris been to grieve, dealing with his grievances alone has, for some time, constituted the lion's share of work for the grievance sections of HHS and OHA.

⁷See my order of July 24, 1986.



The record unmistakably bears out the contention of SSA that respondent's motivation behind these endless grievances has been "to avenge himself" and "disseminate derogatory written materials about" management. Even a passing glance at the content of these grievances exposes how respondent used them as his forum for vilification of others. In filing grievances Burris made no attempt to control his wrath and virtually without abatement referred to his superiors in such sarcastic and insolent language as "Liar", "Sneak Thief", "credenza kid;" "gutless," and "clowns." Ex. C 22 at 356, 435, 445. At first glance, some of respondent's grievances appear to pertain to matters of public concern, for example, bribery of employees. Ex. C 22 at 130, 362. However, upon closer examination, it is



evidence that those grievances do not truly raise matters of public concern.

For example, respondent alleged that Hiaring and Steadman bribed employees to support management by bringing food to the office. He explained this allegation in one of his grievances as follows:

Hiaring refers to the practice of bringing food item [sic] in as treats. The items here were brought in by he [sic] and/or Steadman as a bribe, pure and simply. Time was taken to eat the same. The other treats he refers to are placed on a table and people take them and eat them at their desk, etc. No one calls "official" time off for that as Hiaring and Steadman have done, and are doing.

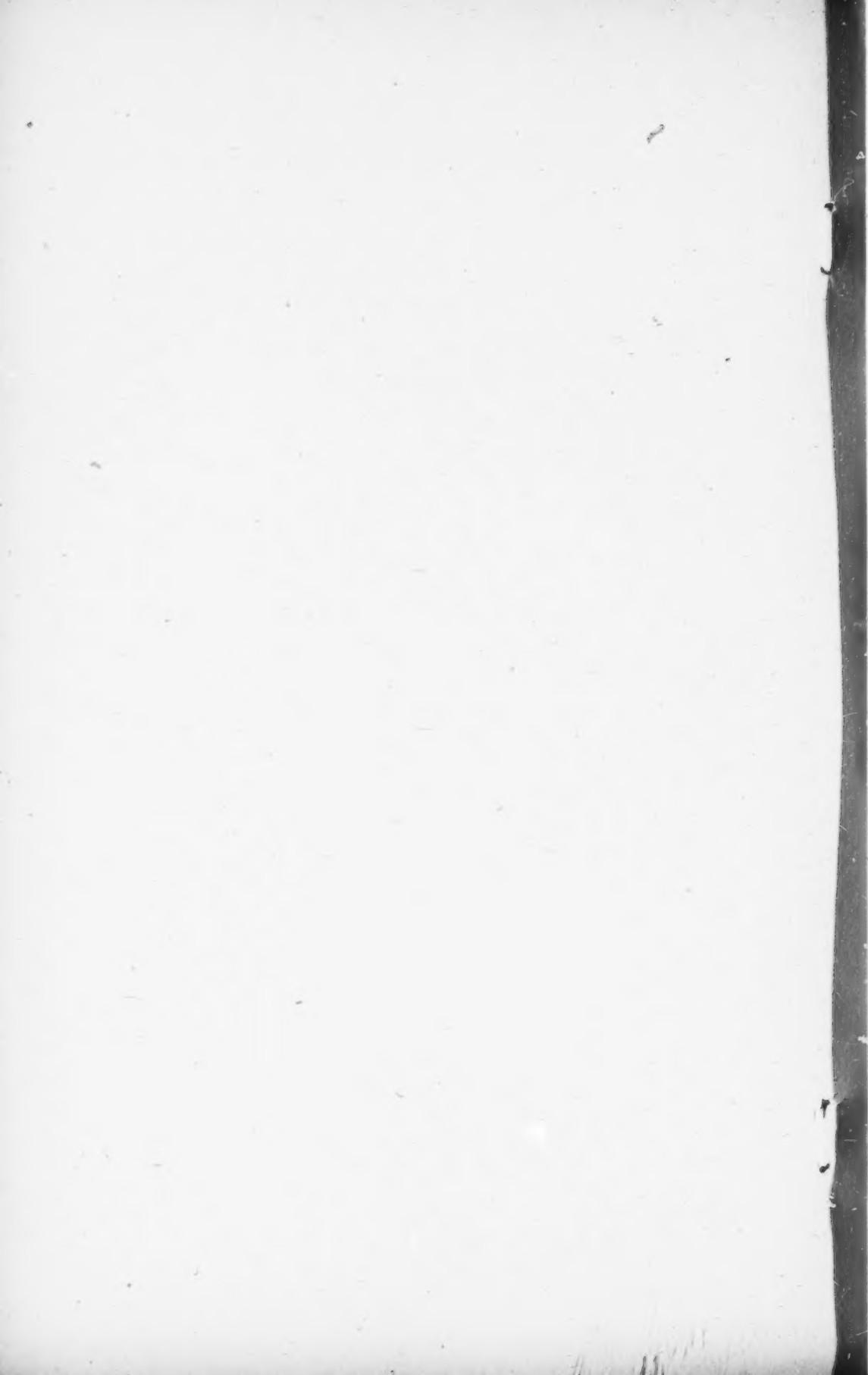
Ex. C 22 at 131. The fatuous nature of this grievance and similar ones is evident on its face and is further shown by the remedy sought by respondent, who stated, "I will take my aliquot share of bribes of this nature in cash." Ex. C 22 at 132. Because respondent's grievances



pertained to matters of his personal concern - not matters of public concern - his comments in them are not entitled to constitutional protection. See Mings, id. Even assuming arguendo that his comments deserve such protection, he has not shown that his free speech interest outweighed the interest of the agency in maintaining order and respect for authority in the workplace. Respondent's hostile, discourteous and abusive attitude toward his supervisors, as reflected in his grievances, clearly had a disruptive effect on the workplace. Id. Count Two is sustained by preponderant evidence.

Count Three

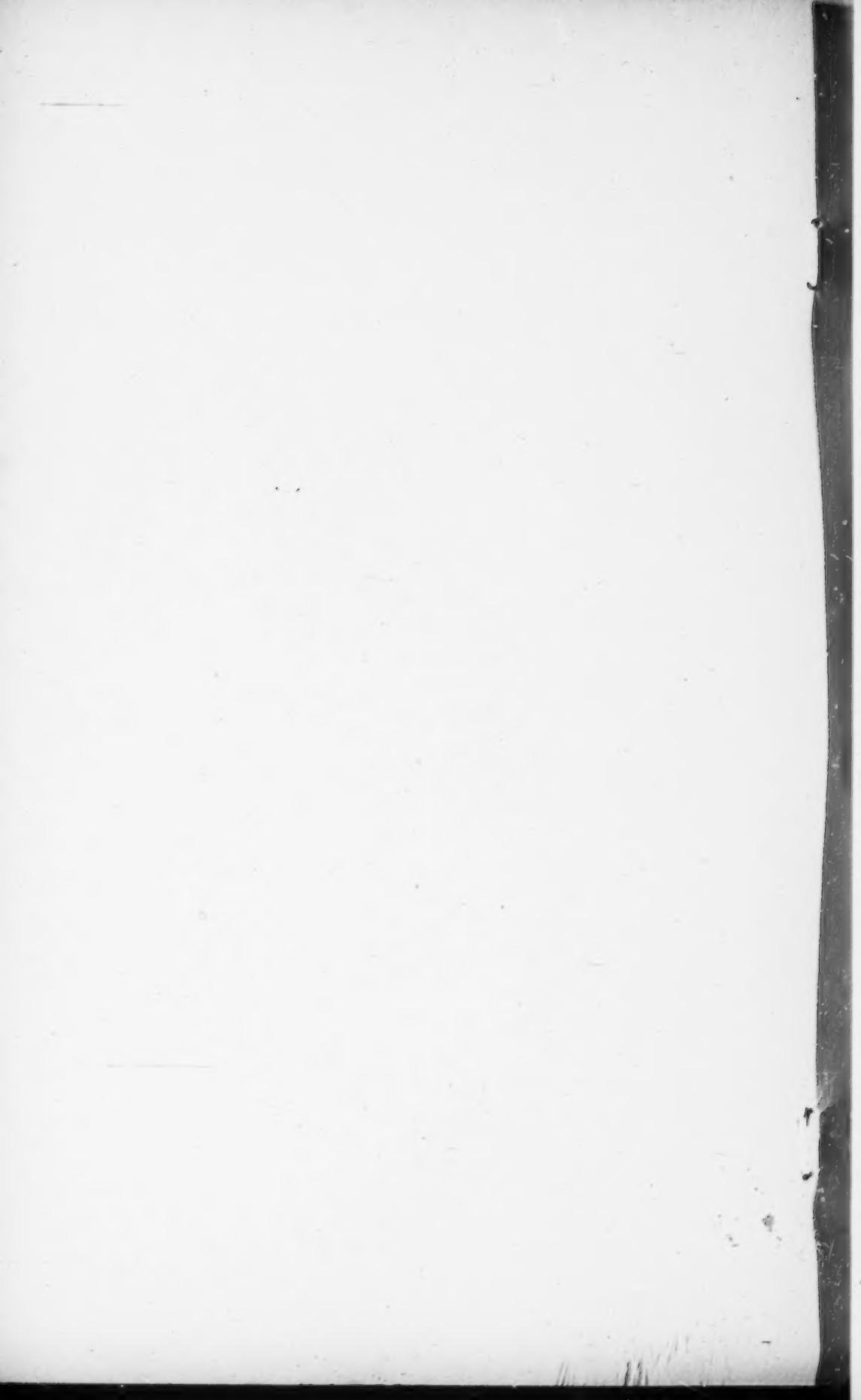
Count Three alleges that respondent was insubordinate by failing to comply with an order from Judge Paul Rosenthal, the Acting Chief ALJ of OHA. The order



was set forth in a memorandum entitled, "Admonishment for Unprofessional Conduct," issued to respondent on January 8, 1985.⁸ Ex. C-2.

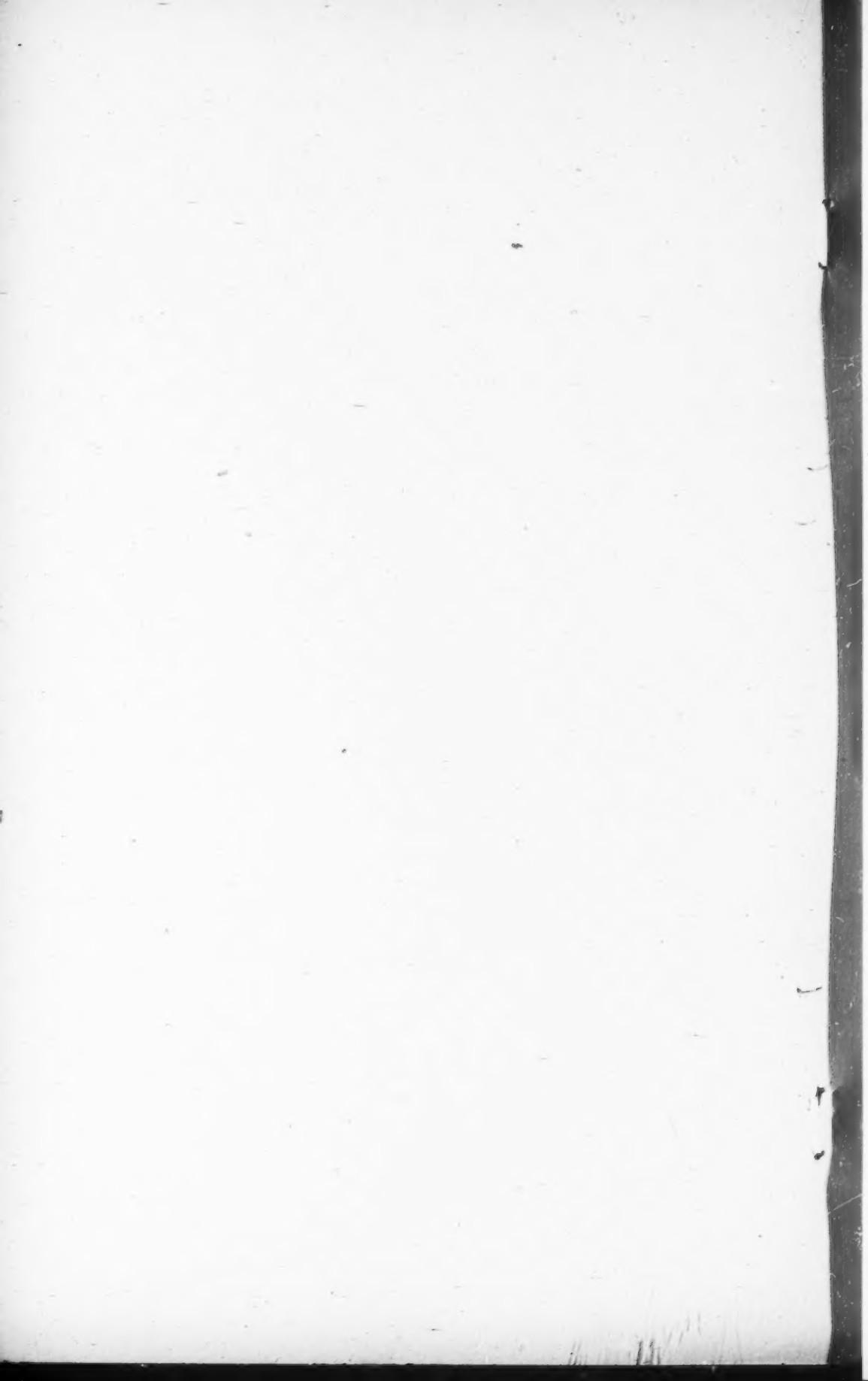
The gist of the admonishment was that respondent was no longer to use "intemperate language" in his official communications. Recognizing respondent's right to express disagreement with management and supervisory policies and practice, Judge Rosenthal nonetheless proscribed respondent's use of "defamatory epithets and language which is abusive, inflammatory and intentionally offensive" in official correspondence. Judge Rosenthal advised respondent that it was imperative that he comport himself with the conventions of

⁸The Admonishment also contained the statement that, "Failure to comply with these directives may result in disciplinary action."



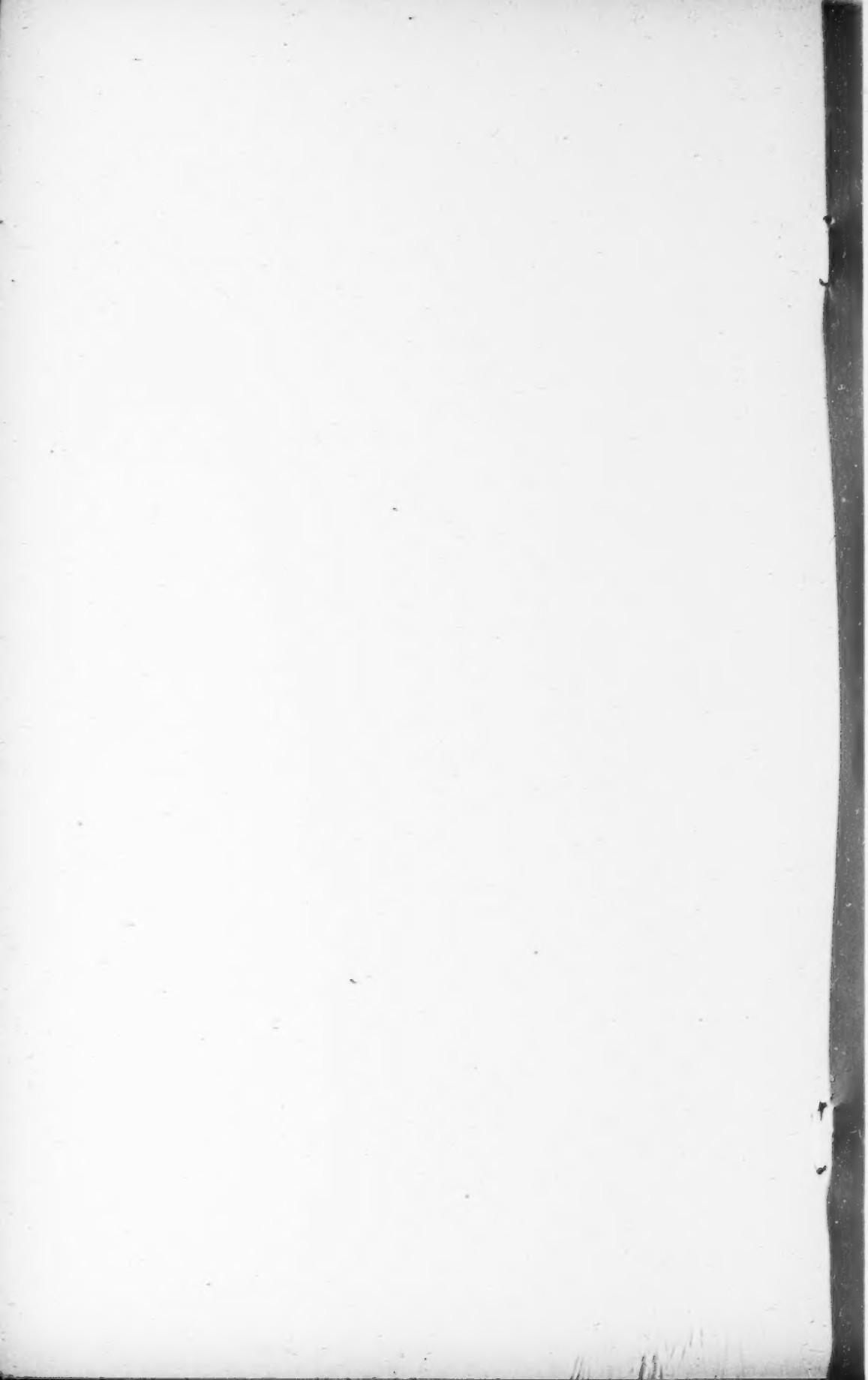
behavior under which responsible people conduct themselves.

Respondent is, by any standard, a prolific writer. In addition to his frequent use of grievance procedures, he writes letters to Congress, the media, and others. This charge however concerns official or "in-house" correspondence. Specific language which Judge Rosenthal found unacceptable was respondent's reference to administrative supervisors as "liar", "sneak thief", "gunslinger", "credenza kid", "whiney the wimp Hiaring", and "Mr. Mendacious Management." Statements or references which Judge Rosenthal considered inappropriate included respondent's use of appellations such as "moron", "mafia management", "you and your underlings", "goons," "management cronies", the "gang" and "gangsters".



While there was a temporary abatement in respondent's use of such language following the admonition, he admitted that he resumed the use of abusive language relating to the management of OHA and SSA. R. Dep. I 220. By his actions -- relentlessly inveighing against his superiors in sarcastic, calumnious language-- respondent manifests a disaffected attitude toward any authority. By directly ignoring his supervisor's directive -- a directive which is no way entrenches upon his right of decisional independence -- respondent has how himself to be cavalierly insubordinate.

It is, of course, understandable that an individual who feels aggrieved may resort to rude or even caustic language. But it seems evident from this record that respondent has shown gross



insubordination by his relentless use of disparaging language. Importantly, whatever points or arguments respondent seeks to make can easily be made by the use of language not rooted in outright disrespect.

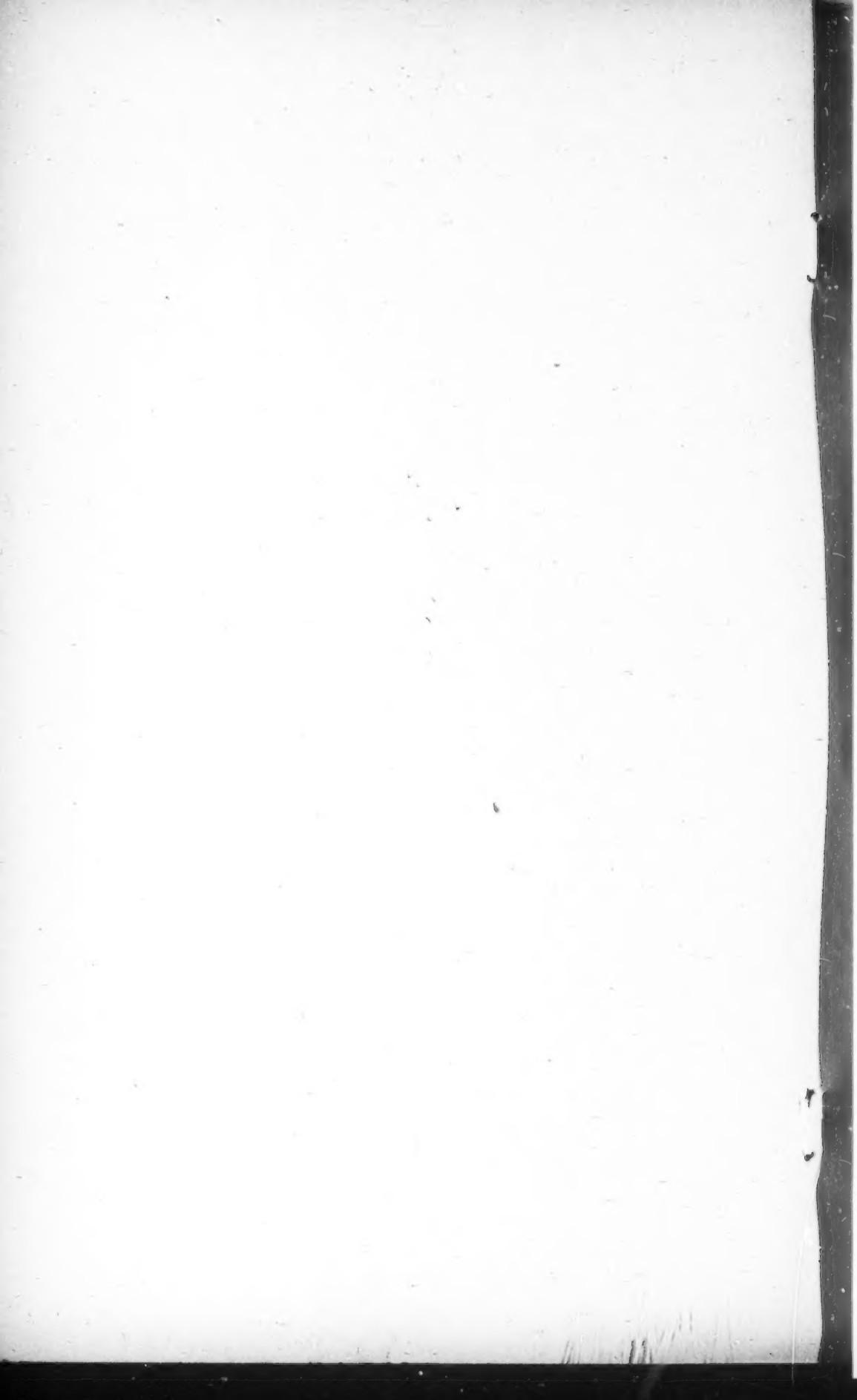
The general course of disrespectful and contumacious conduct has no constitutional protection. The flow of invectives by Burris borders on the incredible. Burris chooses disobedience over any other means to question authority and is constantly vengeful in an attempt to assuage his feelings for imagined wrongs. Preponderant evidence supports this charge.

Whether Burris in his statements has addressed matters of public concern-- and thus became entitled to protection under the First Amendment -- must be determined by their content, form and



context as revealed by the whole record.

Connick v. Myers, 461 U.S. 138, 147-48 (1983). I find the circumstances under which communicative activity--statements -- by Burris were made demonstrate that his "speech" was not pegged to matters of general concern, but solely internal matters or those essentially of interest to him alone. Burris has a propensity for making baseless, hyperbolic statements. His comments are rife with invective, some of it scandalous. Respondent seizes any opportunity to demonstrate his insolent disrespect toward superiors at any level as he tries to embarrass them. His conduct -- speech -- has not been related to issues of public concern, but is an excessive expression of his own personal disaffected attitude. Burris has overstepped appropriate bounds. His

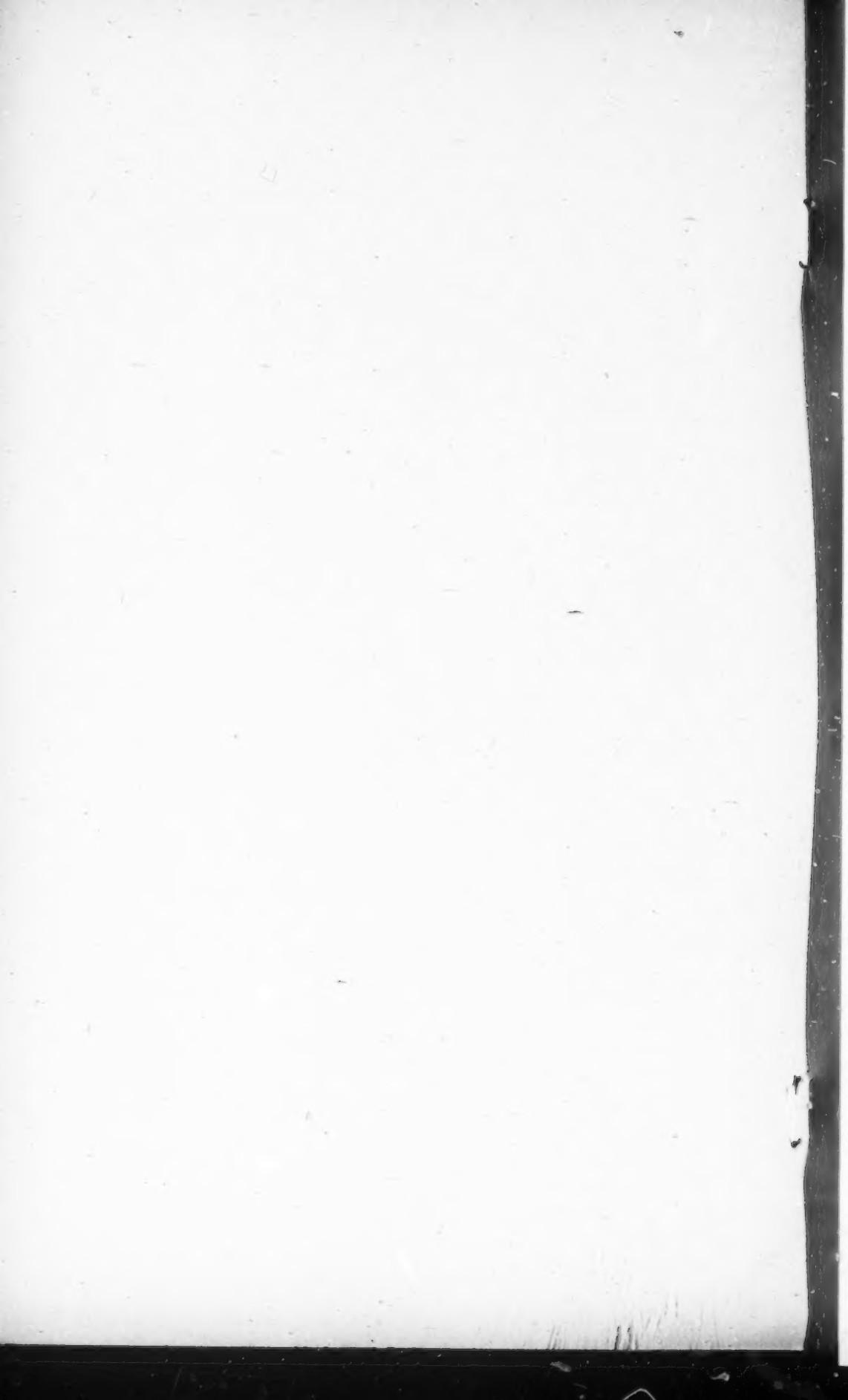


motivation for speaking out so churlishly was peculiar to him and had no public concern implications.

On the other hand, SSA surely has a legitimate interest in insisting upon temperate speech - or at least that which does not hold it up to ridicule.

Count Four

Count Four alleges that respondent was insubordinate by refusing to follow another order from Judge Rosenthal. In addition to admonishing respondent for using derogatory language in correspondence, Judge Rosenthal's January 8 memorandum cautioned respondent to cease certain practices he engaged in when adjudicating his cases. Ex. C 2 at 2-3. In his memorandum Judge Rosenthal stated that respondent abused his authority by using his decisions as vehicles to insult and discredit other



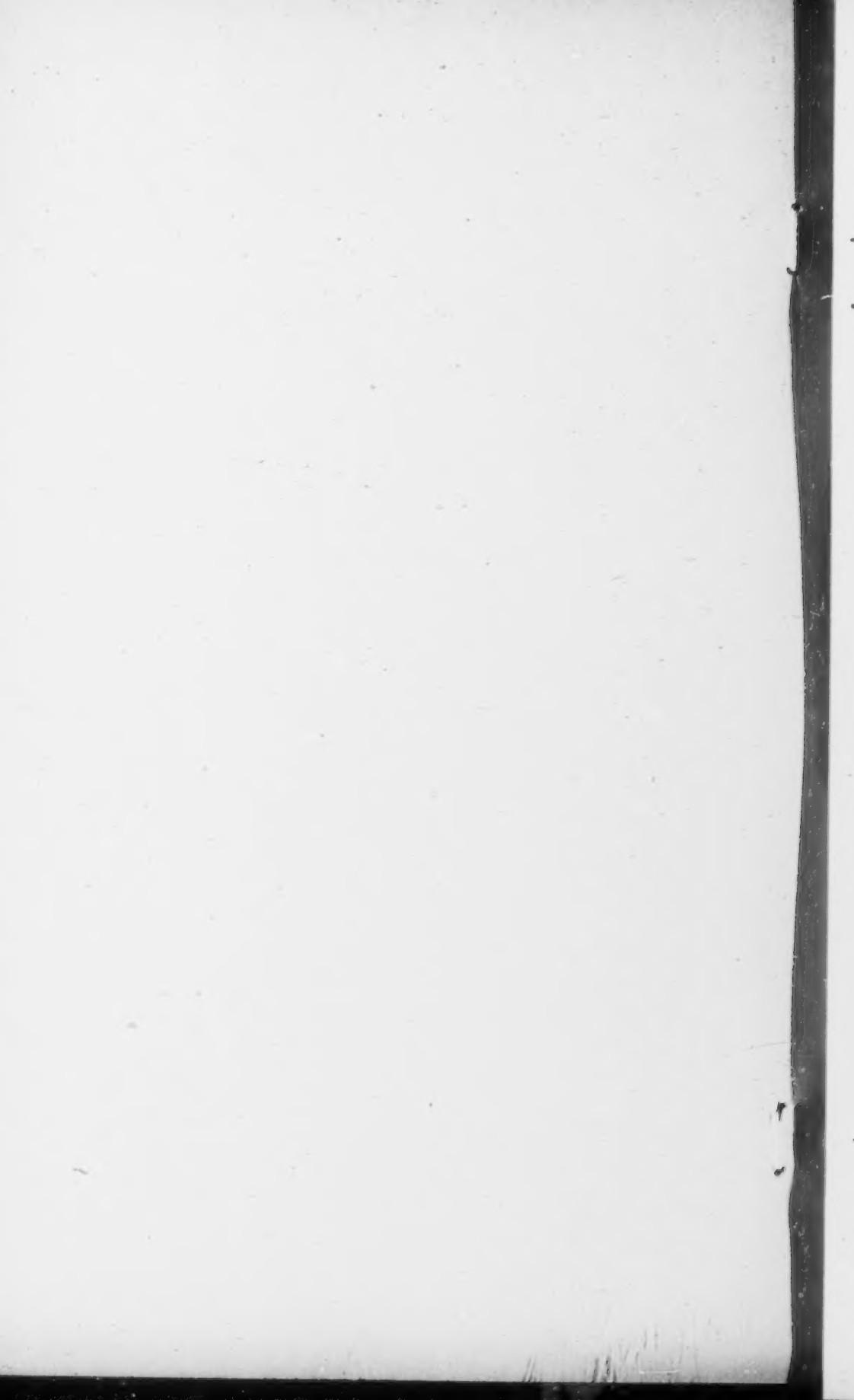
agency employees. Specifically, Judge Rosenthal quoted the following excerpt from one of respondent's decisions: "[I]t is unequivocally clear that the remand was intentional, willful and malicious and . . . solely designed to harass claimants." Stating that such conjecture regarding the possible motives of the SSA Appeals Council was irrelevant to the issues before respondent as an ALJ, Judge Rosenthal cautioned him that his role as an impartial adjudicator was compromised when he assumed an adversarial stance against either the claimants or the government.

Judge Rosenthal also stated in the January 8 memorandum that respondent's use of his decisions to express personal opinions was unprofessional. He accused respondent of relying on anecdotes, nonspecific perceptions, and unsupported



conclusions in finding in a decision that there is an "ongoing effort at the OHA, the SSA and the DHHS to reduce the number of people on disability by any and every means." Judge Rosenthal stated further in this regard that:

Based on this nonevidentiary belief that a claimant was denied due process, you fashioned without authority, an exclusionary rule whereby you 'disregard[ed] and [gave] no weight or credibility to any part(s) of any exhibit(s) that can in any manner be construed adversely to the claimant, i.e., as not fully supporting the claimant.' This sort of action is at best reckless and clearly constitutes a dereliction of your duty. You do not have the authority to either rule on constitutional issues or to formulate your own exclusionary rule. As a lawyer and administrative law judge, you know or should know that your decisions must be based on all of the evidence of record. You may not "disregard" and "give no weight" to evidence because of your personal theory concerning due process of law. This sort of behavior raises a serious question of your ability to conduct fair



hearings and render just decisions.

Judge Rosenthal concluded by directing respondent to refrain from the practices in question and by warning him that failure to comply with that directive may result in disciplinary action.

Respondent began sending copies of Judge Rosenthal's January 8 memorandum to all claimants and their representatives in his pending cases. In his accompanying memorandum to them, he stated that he was placing Judge Rosenthal's memorandum into the record in each case because it wa intended to impact on his decisions, and it therefore constituted an ex parte communication prohibited by 5 U.S.C. Section 557. Ex. C-3.

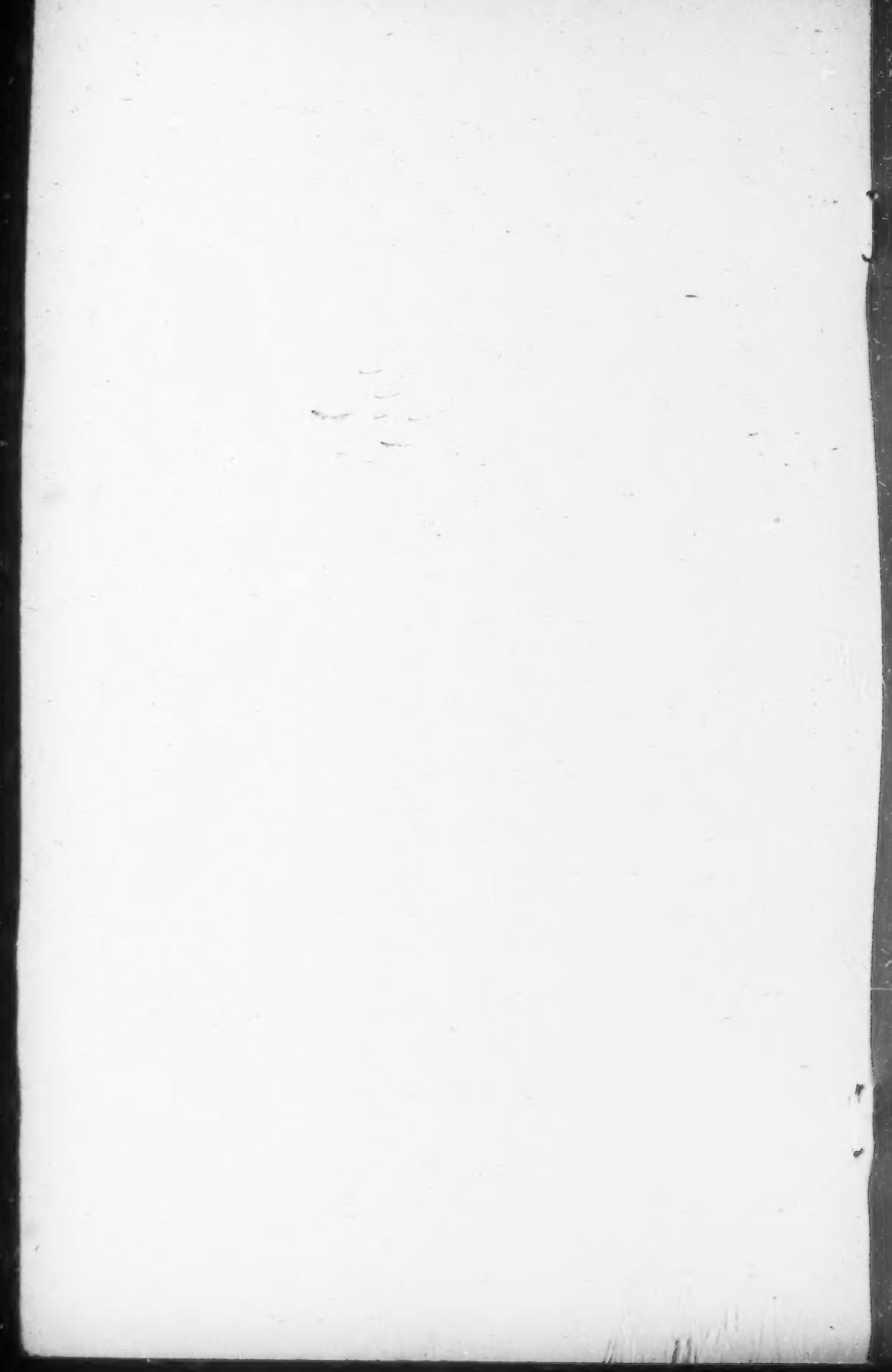
On March 18, 1985, Judge Rosenthal advised respondent that the January 8 memorandum was not an ex parte

APPENDIX C 000098

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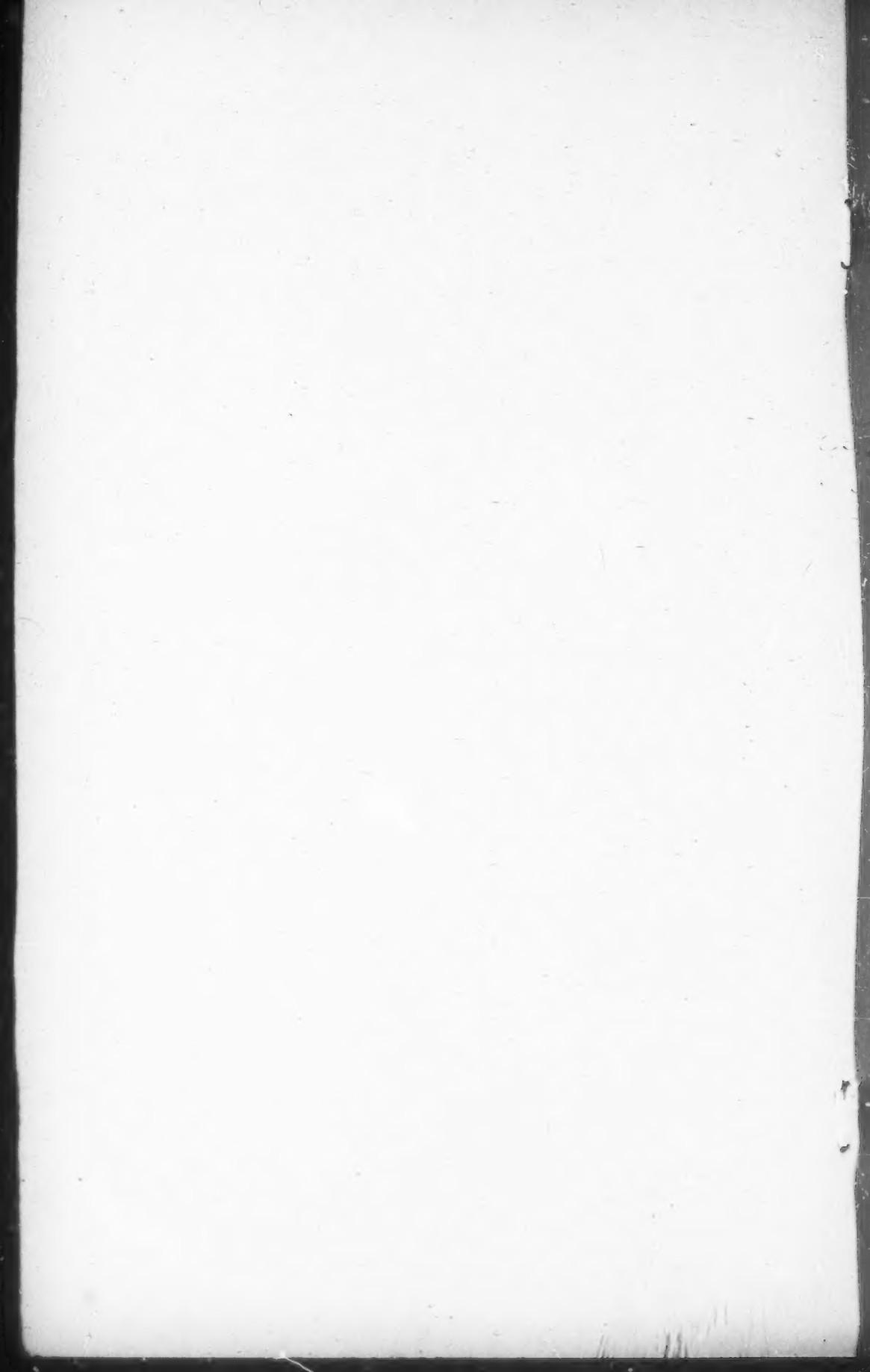
communication and directed him to stop sending the memorandum in question - a practice which he viewed as insubordinate and an abuse of authority. Ex. C-4. However, respondent admitted that he failed to comply with that directive. Tr. I 14; R. Dep. I 224. The agency contends that respondent was insubordinate by refusing to comply with Judge Rosenthal's order. In essence, respondent contends that he was justified in so refusing because his actions in that regard were protected by his qualified decisional independence.

Without question, ALJs have a "qualified right of decisional independence." Nash v. Califano, 613 F.2d 10 (2d Cir. 1980); Social Sec. Admin. v. Goodman, 19 M.S.P.R. 321, 327 (1984). This means that the adjudicatory process is structured so as to "assure



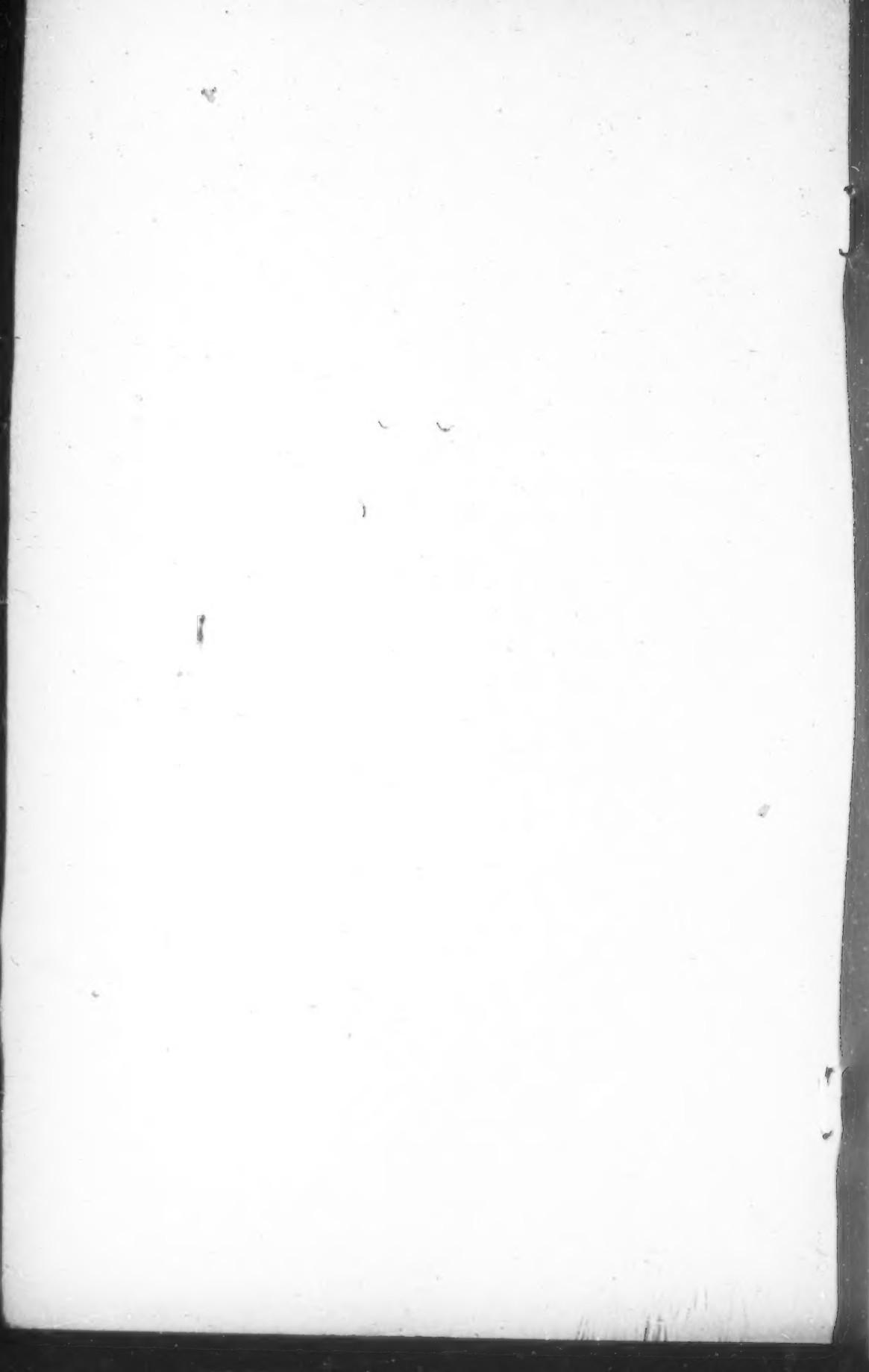
that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency." Butz v. Economou, 438 U.S. 478, 513 (1978). This independence "is designed to maintain public confidence in the essential fairness of the process through which Social Security benefits are allocated by insuring impartial decision making." Nash, 613 F.2d at 16. Thus, "[i]f the agency bases a charge on reasons which constitute improper interference with the ALJ's performance of his quasi-judicial functions, the charge cannot constitute 'good cause.'"
Brennan, id.

However, "[w]here a management need exists to impose reasonable requirements which would not affect an ALJ's ability to provide full and fair hearings and to



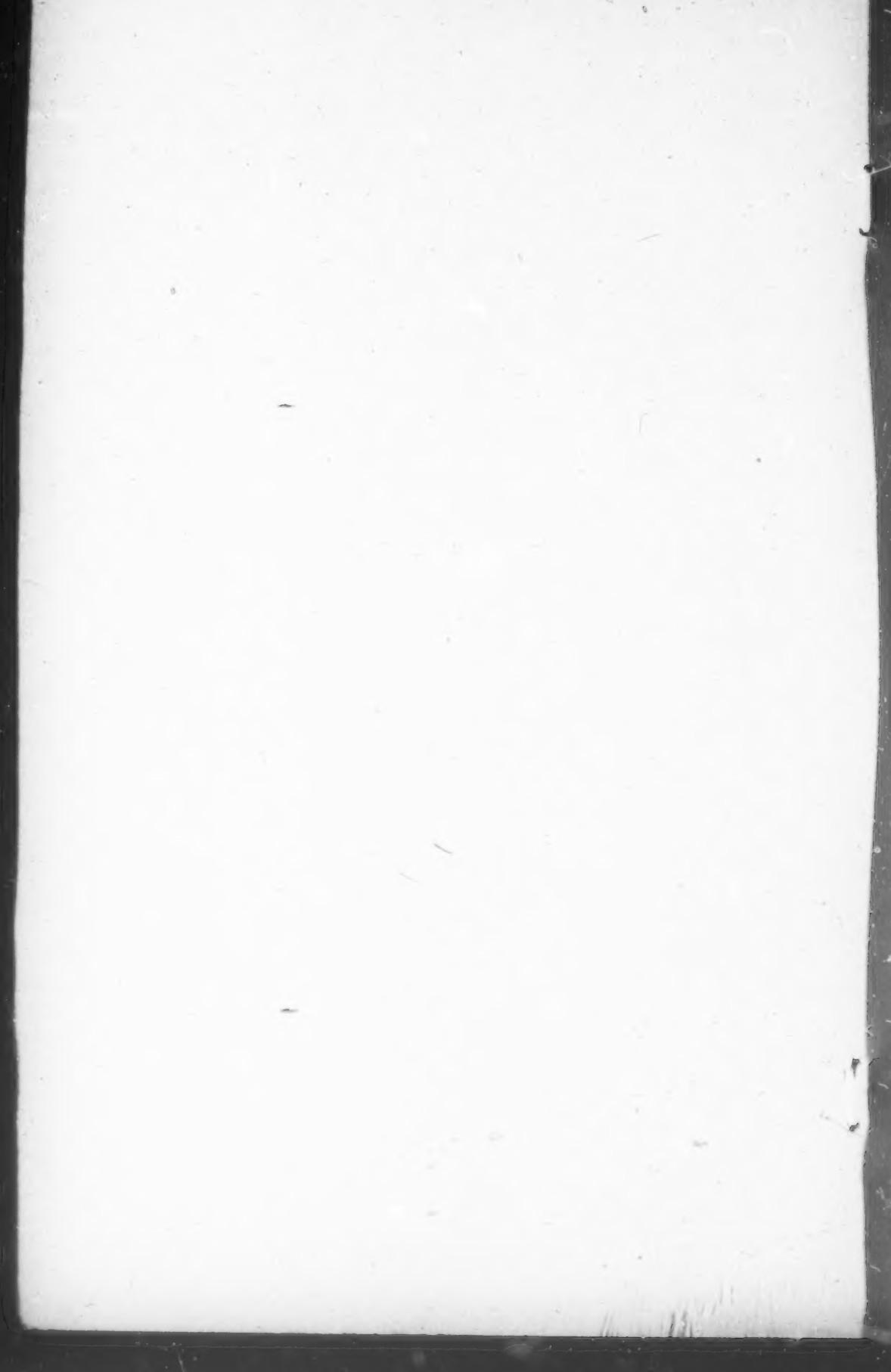
render impartial and complete decisions, an ALJ would not be justified in refusing to comply with such instructions." Brennan, id. Furthermore, "an ALJ can be removed on the basis of actions taken by him or her in the course of an adjudicatory proceeding." Social Security Administration v. Glover, 23 M.S.P.R. 57, 76 (1984). An ALJ's qualified independence "does not give that judge carte blanche authority to conduct the government's business in a biased and destructive fashion which undermines and casts disrepute on the adjudicatory process." Matter of Chocallo, 1 M.S.P.R. 605, 610-11 (1980).

I do not find that Judge Rosenthal's January 8 memorandum was intended to interfere or had the effect of interfering with respondent's independent judgment on the evidence before him in



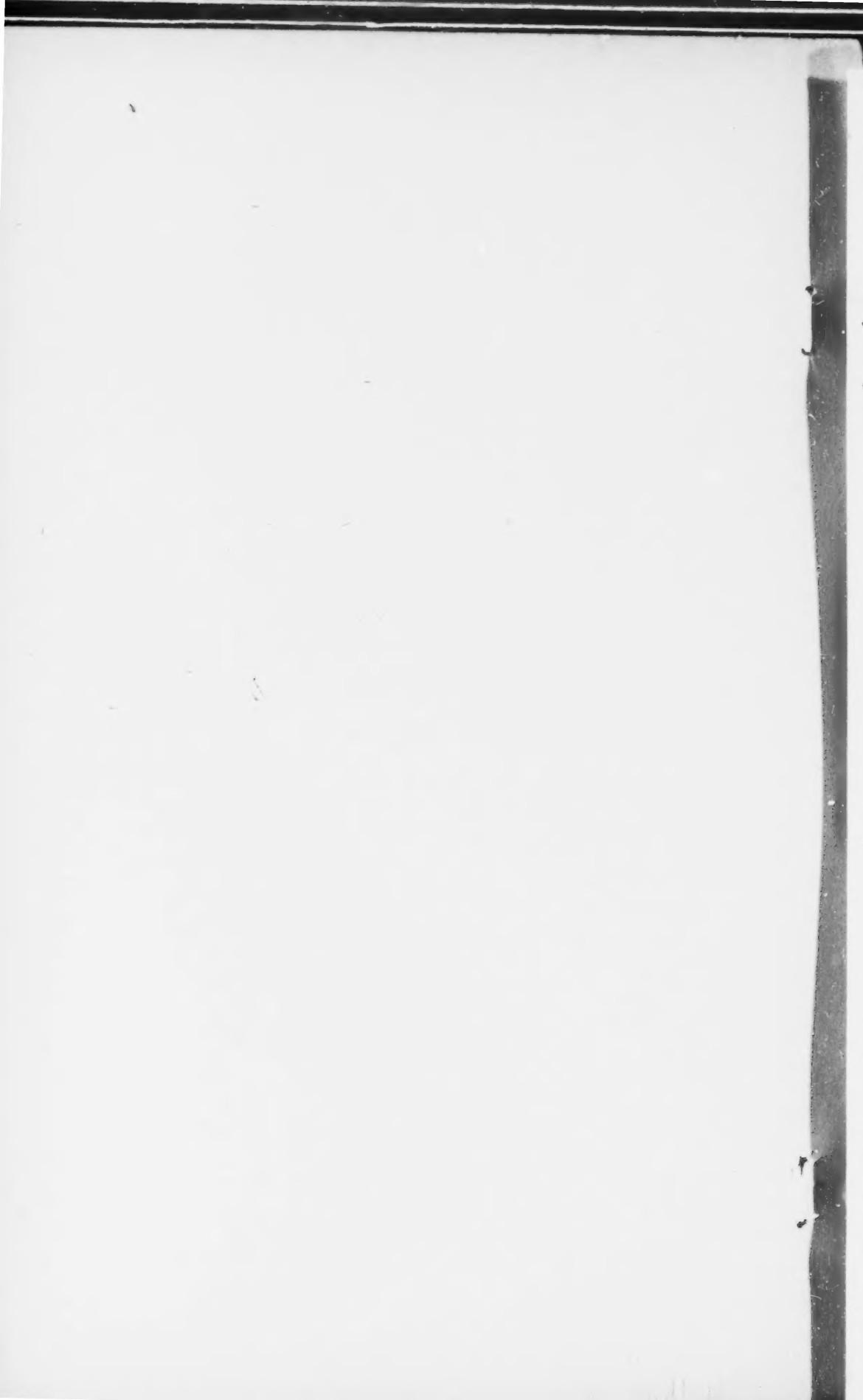
his cases. As Judge Rosenthal explained, respondent's views on the motives of the Appeals Council for remanding a case had no bearing on the issues in his cases, and his making derogatory remarks about the Appeals Council -- the body which performed appellate review of his decisions -- was improper judicial conduct.

Even more improper and indicative of judicial bias was respondent's action of disregarding relevant evidence in a case because of his view that his agency was attempting to "reduce the number of people on disability." Even if true, such an attempt by the agency would have no bearing on the merits of specific cases, and would not warrant the extraordinary action taken by respondent. Thus, I find that Judge Rosenthal's instructions that respondent stop



engaging in such actions were properly motivated by a desire to have respondent decide his cases in a professional, unbiased manner.

I disagree with respondent's assertion that Judge Rosenthal's memorandum was an ex parte communication under 5 U.S.C. Section 557, and that, therefore, he was justified in placing it in the record of all his cases. Under that statute, an ex parte communication occurs when an interested person outside the agency communicates to an ALJ or certain other agency officials regarding the merits of a case, or vice versa. Id. Section 557(d)(1)(A), (B). If such a communication occurs, an ALJ is required to place it in the record of the case in question. Id. Section 557(d)(1)(C). However, the statutory provisions in question do not pertain to communication



between agency officials and ALJs. Thus, by definition, Judge Rosenthal's memorandum did not constitute an ex parte communication under 5 U.S.C. Section 557. Moreover, as discussed supra, Judge Rosenthal's comments could not be reasonably viewed as pertaining to the merits of a case. Even assuming, arguendo, that an ex parte communication occurred, respondent far exceeded his authority under the statute by placing the memorandum in the record in all his cases, not merely those cases to which the memorandum made reference.

Judge Rosenthal's order that respondent cease sending the memorandum in question did not constitute improper interference with the performance of his quasi-judicial functions. Rather, the order was warranted because respondent had improperly treated the memorandum as

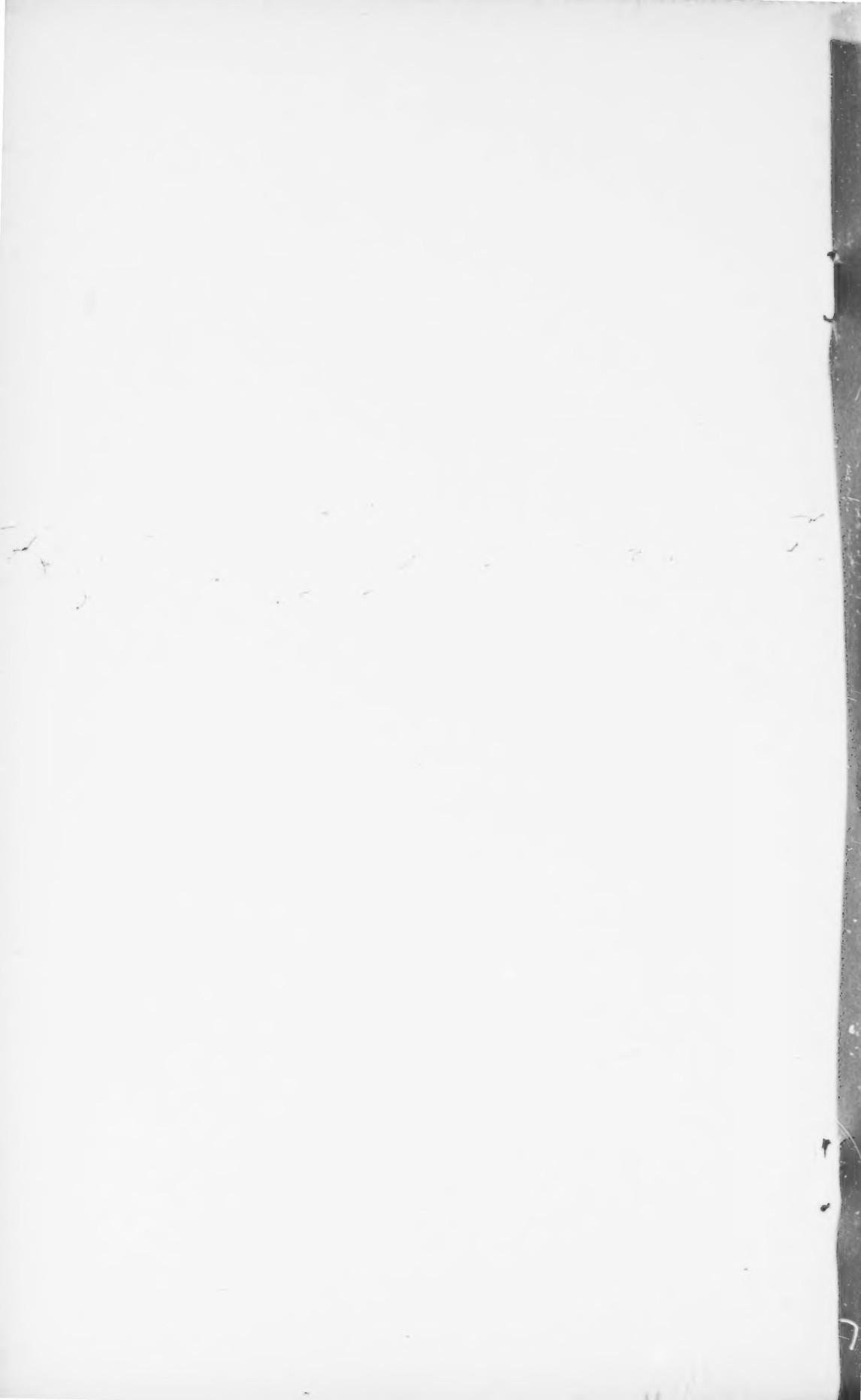


an ex parte communication. Judge Rosenthal's order cannot reasonably be viewed as interfering with respondent's independent judgment on the evidence before him on the merits of the cases in question because respondent could not have reasonably viewed that evidence differently if he had obeyed the order and stopped sending the memoranda. Thus, respondent's failure to comply with Judge Rosenthal's order constituted insubordination. Count Four is sustained by the preponderant evidence.

Count Five

Count Five alleges that respondent misused government penalty mail envelopes for his personal correspondence.

By this count it is alleged that on a number of occasions from 1984 to mid-1986, respondent used government penalty envelopes for his personal correspondence



in violation of 18 U.S.C. Section 1719, 39 U.S.C. Section 3202, 3204 and the HHS Standards of Conduct. 45 C.F.R. Sections 73.735-201(a), 73.735-304(a). It is further alleged that he did so even though he knew, or should have known, that his actions were illegal.

More particularly, SSA charges, respondent improperly used government penalty envelopes to send copies of grievances and other letter of complaint to the media, request information under the Freedom of Information Act, and send letters to EEOC officials. It is further alleged that respondent persisted in using penalty mail even after being told such use was unauthorized. To be sure, SSA maintains and respondent admits he was told to stop, but continued on, ignoring any warnings given.

There is a statutory prohibition

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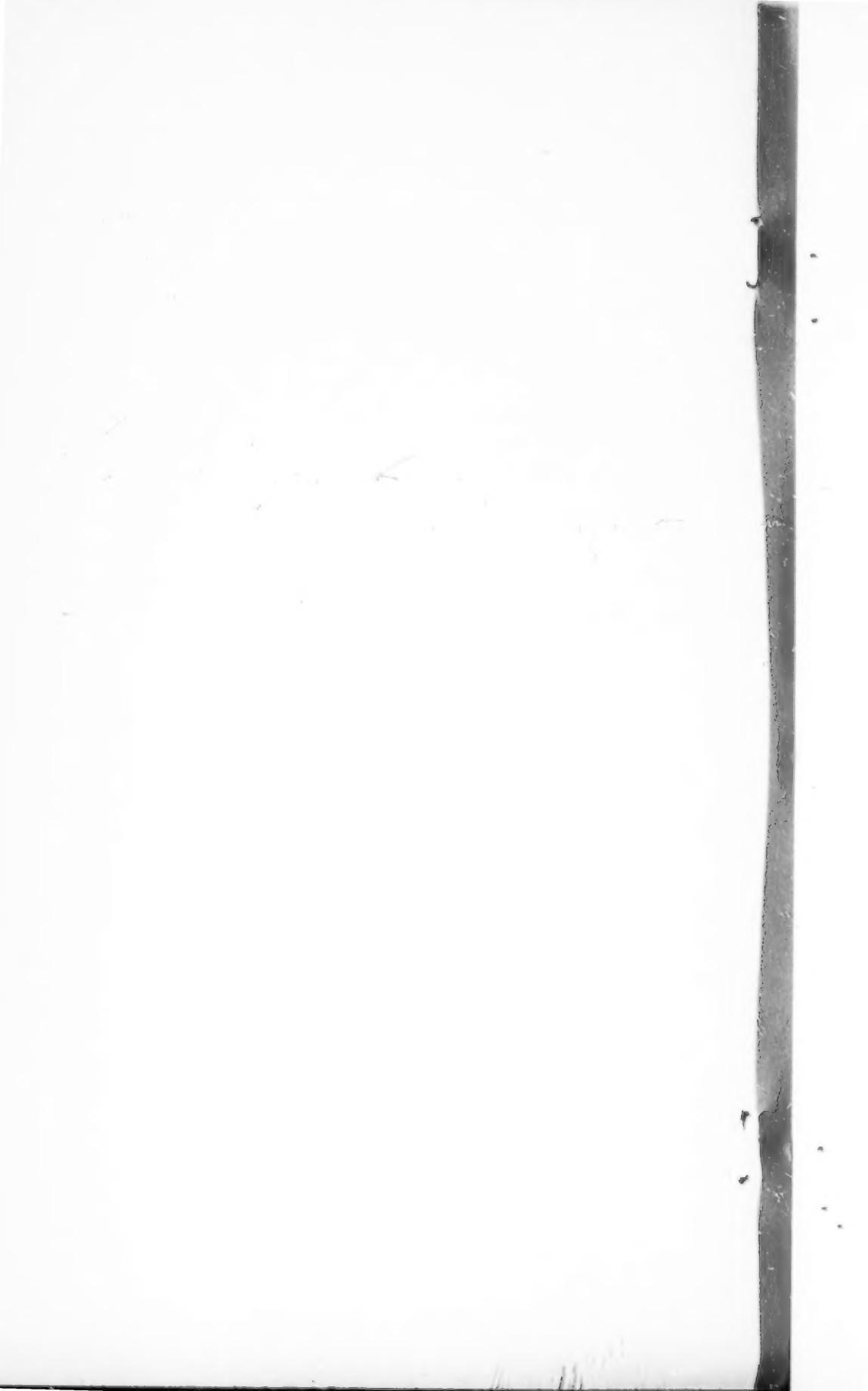
against private use of official mail. See 18 U.S.C. Section 1719. The Postal Service has left it to the discretion of agencies to "determine which matter relates exclusively to its own business." There is, moreover, ample evidence that respondent made use of government penalty envelopes in the manner alleged, and he does not deny so doing. R. Dep. I 32. To my mind, the pivotal question now is whether there was a policy which respondent knowingly violated or ignored with reckless disregard.

Respondent was told by two sources that the use of franked envelopes for FOIA requests was inappropriate, although he felt because his request was - in connection with a grievance that his actions were permissible. R. Dep. I 33; II 42, 43, 51. However, because nobody cited respondent "any law" on the matter,



he continued this use as consistent with established custom and practice. Id. I 36; II 51, 52. For grievances against Hiaring, respondent used certified franked mail. Id. I 236; II 29. Respondent admits that every FOIA request was on government stationery in government franked envelopes.

As seen, respondent has been charged with misuse of penalty envelopes. Put otherwise, it is said that he abused the franking privilege in "reckless disregard" of whether his use -- in connection with grievances -- was officially allowable. Compare Cottman v. U.S. Dept of Labor, 23 M.S.P.R. 688, 690 (1984) and Soroko v. Defense Investigative Service, 29 M.S.P.R. 402, 404 (1985). In view of respondent's admission, this charge has been supported by the preponderant evidence except to



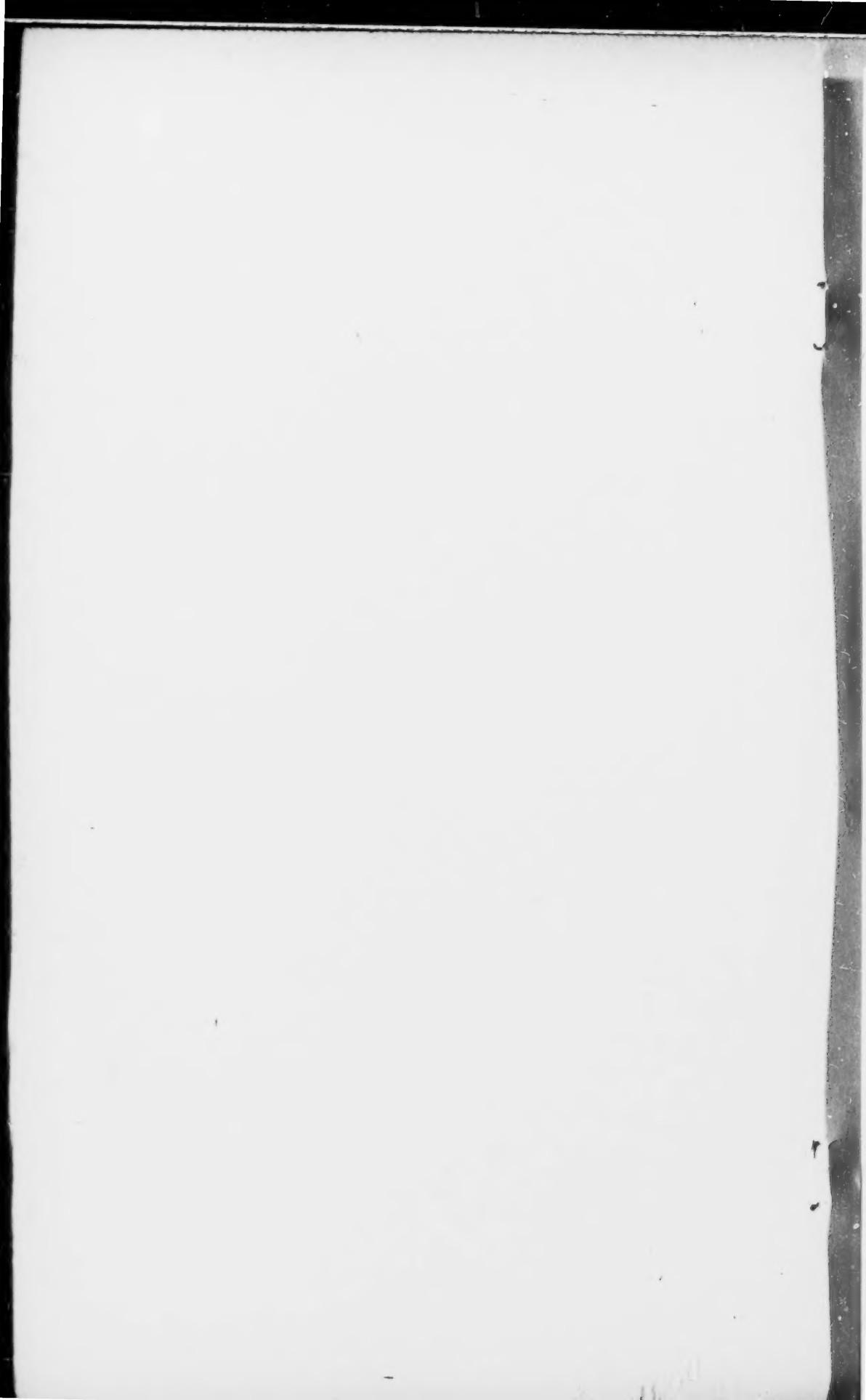
the extent described below. His misuse is made out by his reckless disregard of whether the use was for other than official purposes.

I do not agree that respondent violated the prohibition against private use of the franking privilege when, in a letter of February 6, 1986, he declined a dinner invitation extended by successful claimants in a matter he handled in his official capacity. Nonetheless, it must be noted that respondent used that occasion to vilify SSA staff by describing them as "clowns" in that letter. From time-to-time respondent sent, in franked envelopes, information on whistleblowers to Phil Donahue as well as several known whistleblowers in the government. R. Dep. II 75-77. None of this mailing can, in my judgment, be found official.



GOOD CAUSE

Now that I have determined which of the charges have been sustained, I now address the question whether the sustained charges constitute "good cause" for action under section 7521. I note first that a prior Federal decisions shed some illumination on the proper interpretation of that standard. Removal of ALJs has been authorized for financial irresponsibility, McEachern v. Macy, 233 F.Supp. 516 (D.S.C. 1964), aff'd, 341 F.2d 895 (4th Cir. 1965); for physical incapacitation, Benton v. United States, 488 F.2d 1017 (Ct. Cl. 1973); and, especially important here, for insubordination, Matter of Chocallo, 1 M.S.P.R. 605 (1980), aff'd sub nom. Chocallo v. Prokop, No. 80-1053 (D.D.C. Oct. 10, 1980), aff'd mem. in pertinent part, 673 F.2d 551 (D.C. Cir.), cert.



denied, 103 S. Ct. 128 (1982).

Additionally, the Board has found suspension of an ALJ appropriate for disruptive, insubordinate, obstructionist and dilatory conduct. Brennan, *id.* The last cited case also stands for the proposition that a demonstrated failure by an ALJ to comply with office administrative procedures which do no interfere with his decisional independence may be "good cause" under 5 U.S.C. Section 7521. And in Social Sec. v. Manion, 19 M.S.P.R. 298 (1984), the Board found an ALJ may not refuse to hear cases because of disputes with his supervisors over managerial practices. And the previously mentioned Arterberry and Manion cases hold that inexcusable refusal to hear cases can be "good cause" under the governing statute.

The charges here sustained fall



squarely, in my judgment, within the contemplation of the "good cause" standard of section 7521. And, as seen, most of them have been supported by the preponderant evidence.

CONCLUSIONS

The tale that unfolds here is one of an ALJ whose zeal to lash out incessantly against management at every level has blinded him to an appreciation of the limits of his decisional role. He is not, simply put, above the law. Neither is he free to act insolently in his relentless flood of disparaging remarks. Respondent's evidence aim has not been to speak out on matters of general public concern. He has been bent on airing internal disputes, personal to him, solely in order to gratify his spite. Respondent not only flouts legitimate management initiatives, but also



persistently inveighs against superiors with defamatory comments. Nearly all are called "liars;" many are recklessly said to rely on "bribery" or act "fraudulently." His generally disaffected attitude toward any authority and his general and unrelenting course of disrespectful conduct clearly amounts to insubordination on his part. For some he threatened character assassination. Respondent -- despite his views to the contrary -- is not at liberty to ignore reasonable requests of management.

Brennan, 19 M.S.P.R. 335; Goodman, 19 M.S.P.R. 321. At that, Burris did more than simply fail to comply with reasonable requests: he became vengeful.

he chooses disobedience as his means to question authority and his modus operandi has been direct confrontation. He lacks the fundamental qualities--



including dignity -- universally expected of one who exercises judicial authority.

PENALTY

Inasmuch as many charges have been sustained by the preponderant evidence, good cause for taking action against respondent has been shown. To ascertain what action would be appropriate in light of my findings, the analysis set forth in Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981), will be used as a guide. See Social Security Administration v. Glover, 23 M.S.P.R. 57, 79 (1984).

As an ALJ, respondent occupies a prominent federal office. Throughout his time as an ALJ respondent has been a productive ALJ whose work product is wholly satisfactory. By now he has some 16 years of federal service. Additionally it is clear that Billings



OHA is not a happy place to work. To be sure, some of the blame for that may properly be placed upon respondent, but not all of it. I consider this circumstance a factor in mitigation as job tensions must be taken into account.

The seriousness of the offenses, however, coupled with the malicious nature of some, the relationship of the offense to his duties, and the frequency and notoriety of his offenses lend strength to my penalty selection herein: respondent should not be retained as an ALJ or in the federal service. The facts developed show no good faith errors of judgment or mistakes of law by respondent. What they illustrate is an ALJ who has offended judicial decorum and propriety. The serious nature of the charges sustained against this ALJ compel the finding that he no longer can perform



as an ALJ or in the federal service.

Consider first the disruption of office procedures caused by Burris inherent in his captious refusal to abide by legitimate procedures. Keep in mind, too, his refusal to travel. No supervisor can have confidence in his willingness to carry out his assigned duties. Note hat he flouts the elementary duty of loyalty and frequently rails against superiors with defamatory comments. As to some, he has been insubordinate. And do not overlook how he has abused the grievance procedures and grossly misused the penalty envelope privilege. His actions are serious in nature.

Inherent in my findings of insubordinate conduct is the appreciation that respondent was fully aware his conduct was unacceptable and likely to



result in disciplinary action. He was, in fact, told in advance of the likely consequences. Oblivious, he went on. I see no potential for the rehabilitation of this respondent. Many of the sustained charges relate to matters of longstanding. Beyond that it is clear that throughout the pleadings filed in this case, respondent has continued the intemperate use of language and has, indeed, made scurrilous comments in nearly every pleading filed in this case.

The very serious nature of the sustained charges, their persistence and their impact simply do not lend themselves to suitable alternate sanctions. Nor do any of the matters in mitigation which I have considered warrant a lesser penalty than I have selected. His actions call into question his temperament as an ALJ. The public



interest demands effective and disciplined organizations, not those beset by turmoil and insubordination.

It is my recommendation -- based upon a balancing of the relevant factors applicable to the individualized circumstances -- that the agency be authorized to remove respondent Don Edgar Burris from federal service based upon the sustained charges. By these actions he has forfeited his right to remain as an administrative law judge. It is no exaggeration to say that, in the main, his unacceptable conduct has been repeated, consistent and unchanging.

NOTICE

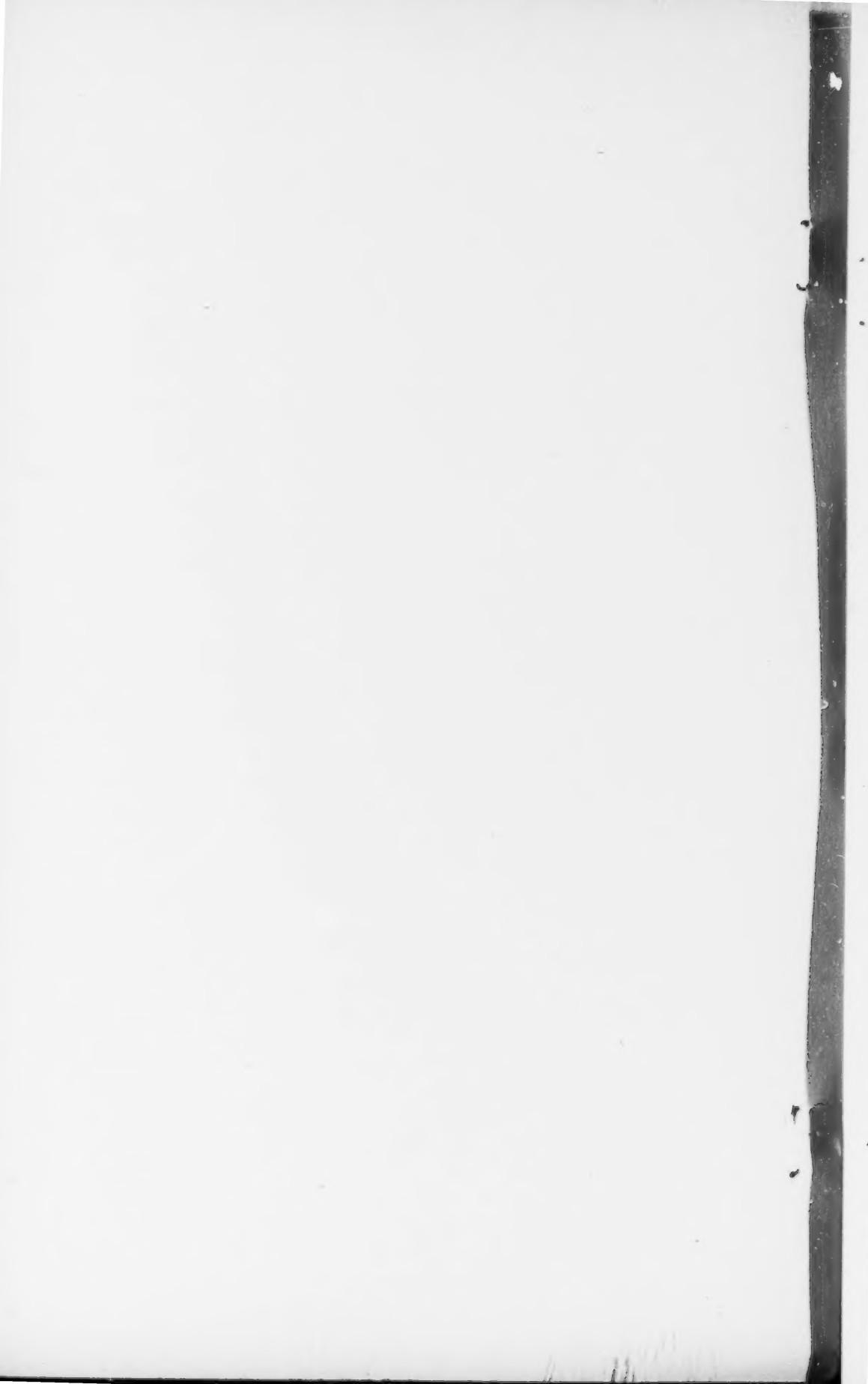
Any party may file exceptions to this recommended decision within thirty-five (35) day of its issuance. Any party, may file a reply to any exceptions within twenty-five (25) days of the date



of service of the exceptions. 5 C.F.R.
Sections 1201.135(b), (c). Exceptions
and replies should be filed with the
Clerk of the Board, Merit Systems
Protection Board, 1120 Vermont Avenue,
Washington, D.C. 20419.

Edward J. Reidy
Chief Administrative Law Judge

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Recommended Decision was sent this date by first-class mail to:

Honorable Don Edgar Burris
Administrative Law Judge
2251 South 56th Street, West
Billings, MT 59106

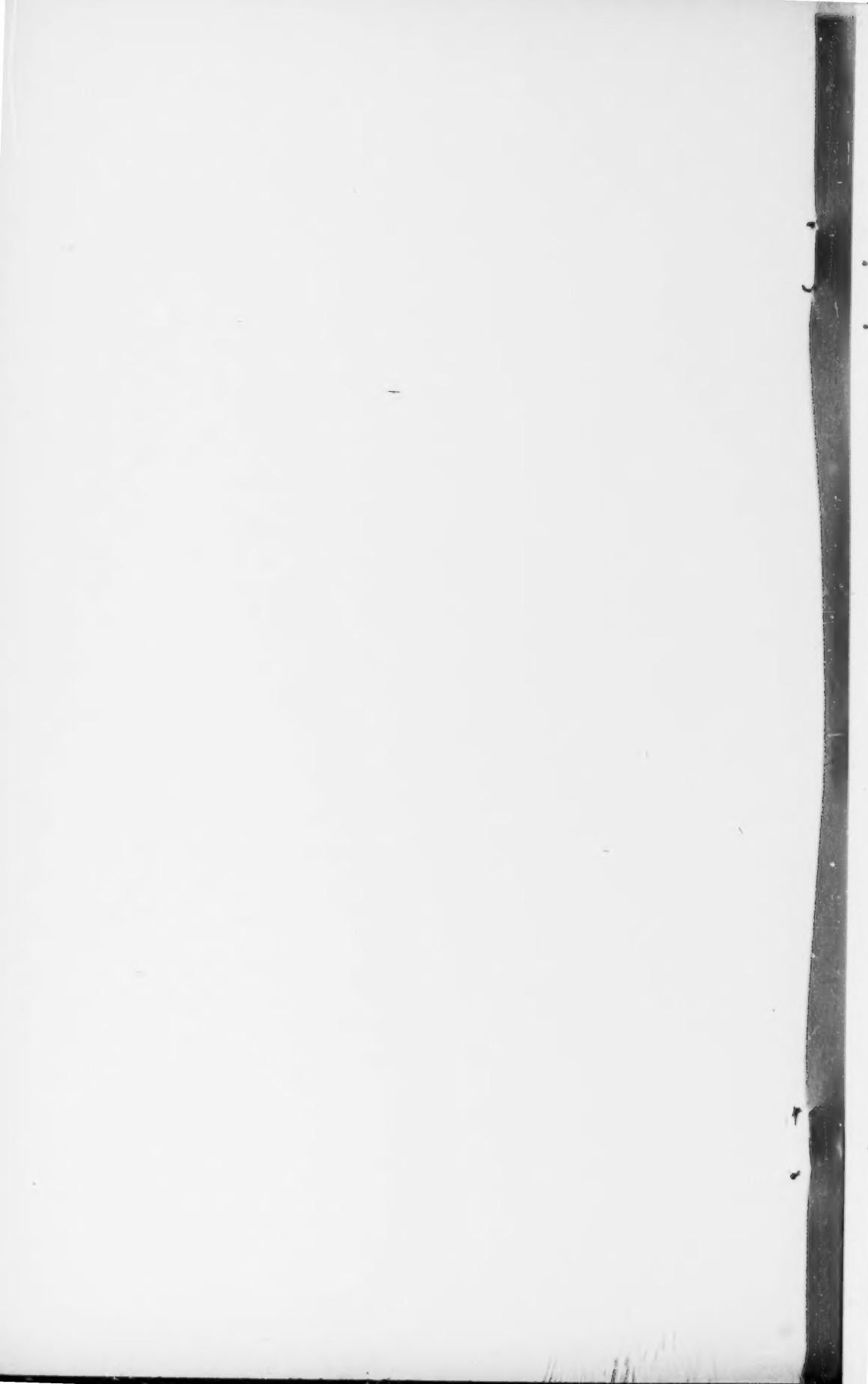
Eileen Inglesby Houghton, Esquire
Daniel J. Edelman, Esquire
Office of General Counsel
Dept. of Health and Human Services
Room 5362, North Building
330 Independence Avenue, S.W.
Washington, DC 20201

Office of Personnel Management
Attn: Timothy Dirks
Appellate Policies Branch
1900 E Street, N.W., Room 7635
Washington, DC 20415

By intra-agency mail to:

Robert E. Taylor
Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W., Ste 802
Washington, DC 20419

Honorable May F. Wiesman
Special Counsel
Merit Systems Protection Board
1120 Vermont Avenue, Suite 1100
Washington, DC 20005



Dated: June 29, 1987

Betty D. Cannon
Secretary

APPENDIX C 000121

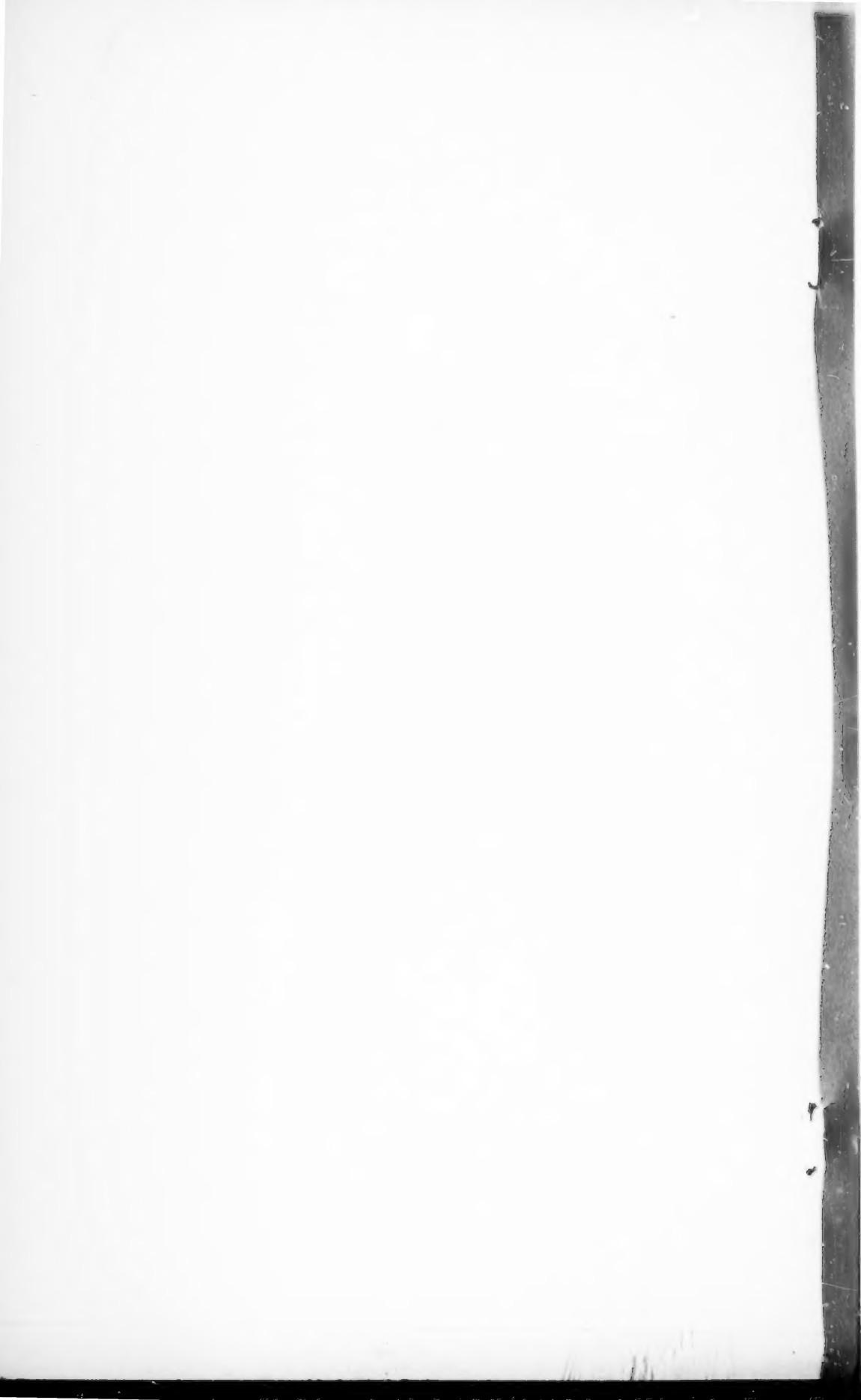


CONSTITUTION

Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (First Amendment)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated.... (Fourth Amendment)

No person shall be...deprived of life, liberty, or property, without due process of law;... (Fifth Amendment)



STATUTES

Section 7702. Actions involving discrimination

(a) (1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who--

(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by--

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16 [42 USCS Section 2000e-16])...

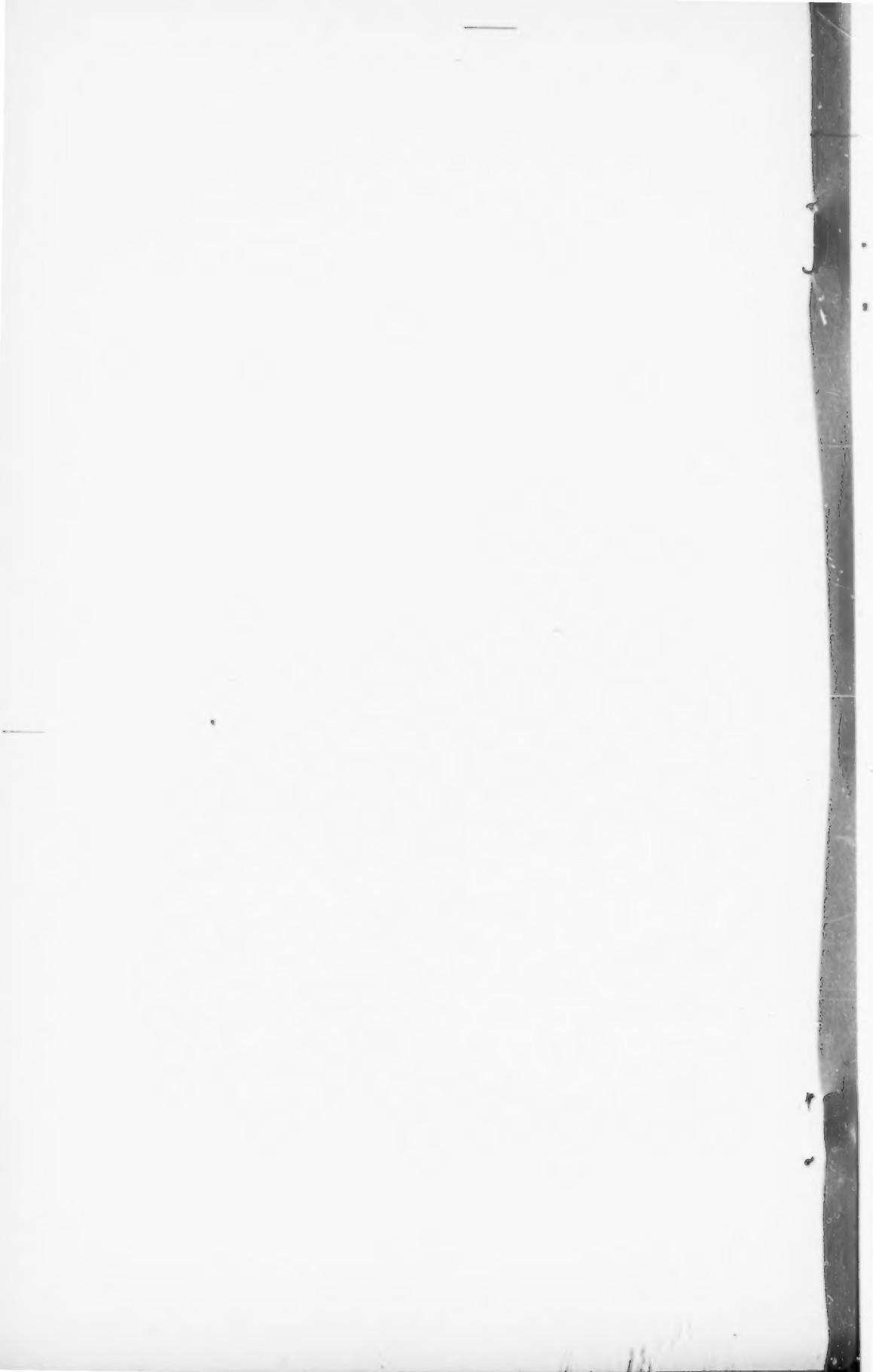
the Board shall, within 120 days of filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title [5 USCS Section 7701] and this section.

(a) (2) In any matter before an agency which involves--

(A) any action described in paragraph (a)(A) of this subsection; and

(B) any issue of discrimination prohibited under any provision of law described in paragraph (1)(B) of this subsection;

the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the



matter to the Board under paragraph
(1) of this subsection. (5 USCS
7702).

APPENDIX E 000124



REGULATIONS

Section 1201.42 Disqualification of presiding official.

(b) A party may file a motion requesting the presiding official to withdraw on the basis of personal bias or other disqualification...

(c) The presiding official shall rule on the motion, the timeliness of the motion, and the sufficiency of the affidavit. If the motion is denied, the party requesting withdrawal may request certification of the issue to the Board as an interlocutory appeal under Section 1201.91. Failure of the party to request certification shall be considered a waiver of the request for withdrawal. (5 C.F.R. 1201.42).

Section 1201.133 Filing of Complaint.

To initiate an action against an administrative law judge, an agency shall file a complaint with the Board setting forth with particularity the facts that support the proposed action. (5 C.F.R. 1201.133).

Section 1201.134 Procedure.

The administrative law judge against whom the complaint is filed may file an answer to the complaint in compliance with Section 1201.125 of this subpart. (5 C.F.R. 1201.134).

Subpart E--Procedures for Cases Involving Allegations of Discrimination



Section 1201.151 Scope and policy.

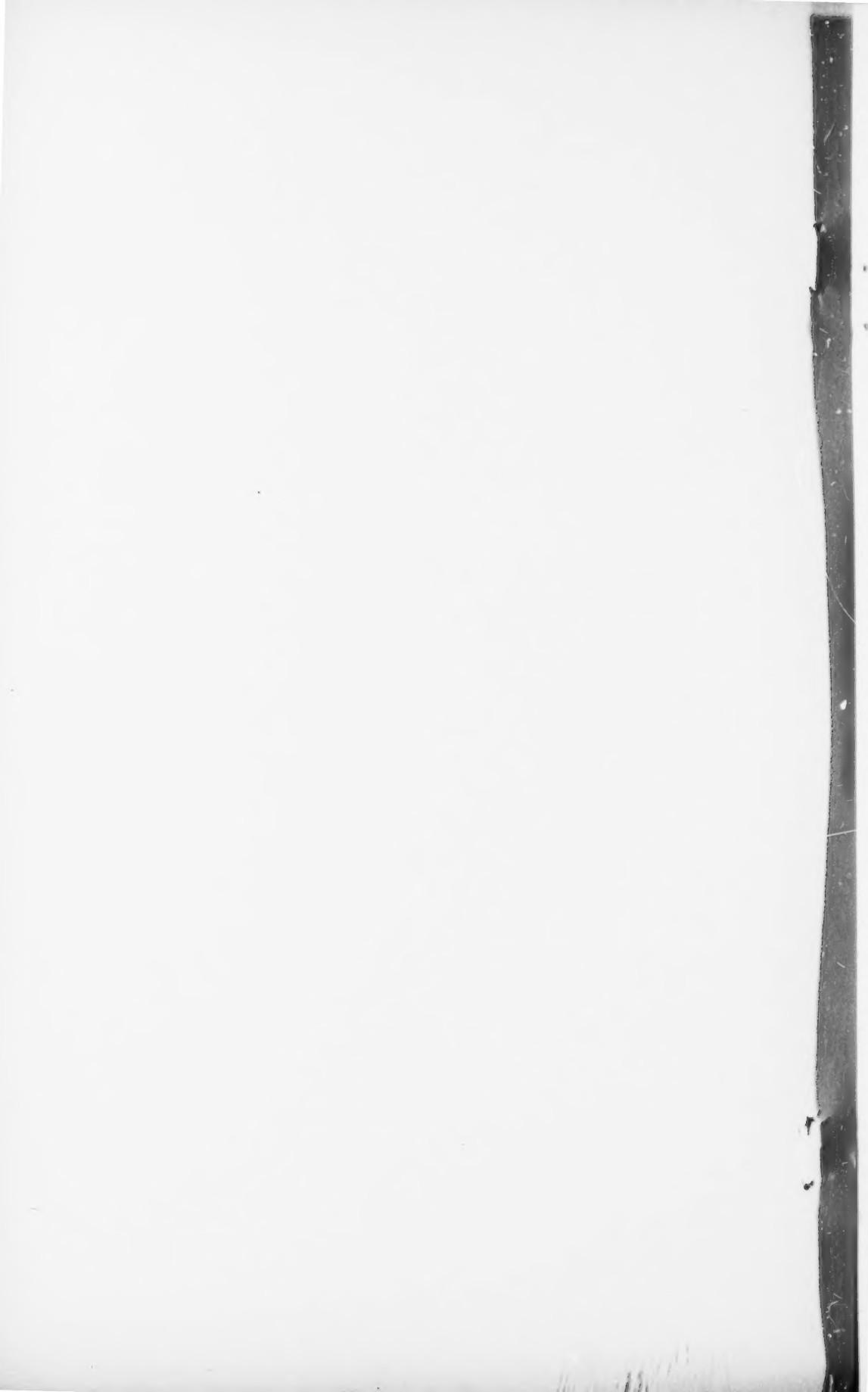
(a) Scope.

(1) The rules in this subpart implement 5 U.S.C. Section 7702, and apply in any case where an employee or applicant for employment alleges that a personnel action appealable to the Board was taken, in whole or in part, on the basis of prohibited discrimination.

(2) "Prohibited discrimination" as used in this subpart means discrimination prohibited by:

(i) Section 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. Section 2000e-16(a));... (5 C.F.R. 1201.151).

(b) Policy. It is the policy of the Board to adjudicate impartially, thoroughly and fairly all issues raised under this subpart in the course of an action brought before the Board. In doing so the Board will allow appellants an opportunity to raise allegations of discrimination during the appeals process and to fully present evidence in support of the charges raised. (5 C.F.R. 1201.151).



Section 1201.156 Time for processing appeals involving allegations of discrimination.

(a) Issue raised in petition. When an appellant alleges prohibited discrimination in the petition for appeal, the Board shall decide both the issue of discrimination and the appealable action within 120 days of the filing of the appeal.

(b) Issue not raised in petition. When an appellant has not alleged prohibited discrimination in the petition for appeal, but has raised the issue subsequently in the proceeding, the Board shall decide both the issue of discrimination and the appealable action within 120 days after the issue is raised. (5 C.F.R. 1201.156).



UNITED STATES SENATE
COMMITTEE ON
GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-8250

February 17, 1987

The Honorable Edward J. Reidy
Administrative Law Judge
Office of Administrative Law Judge
Merit Systems Protection Board
Suite 840, 1120 Vermont Avenue, N.W.
Washington, D.C. 20419

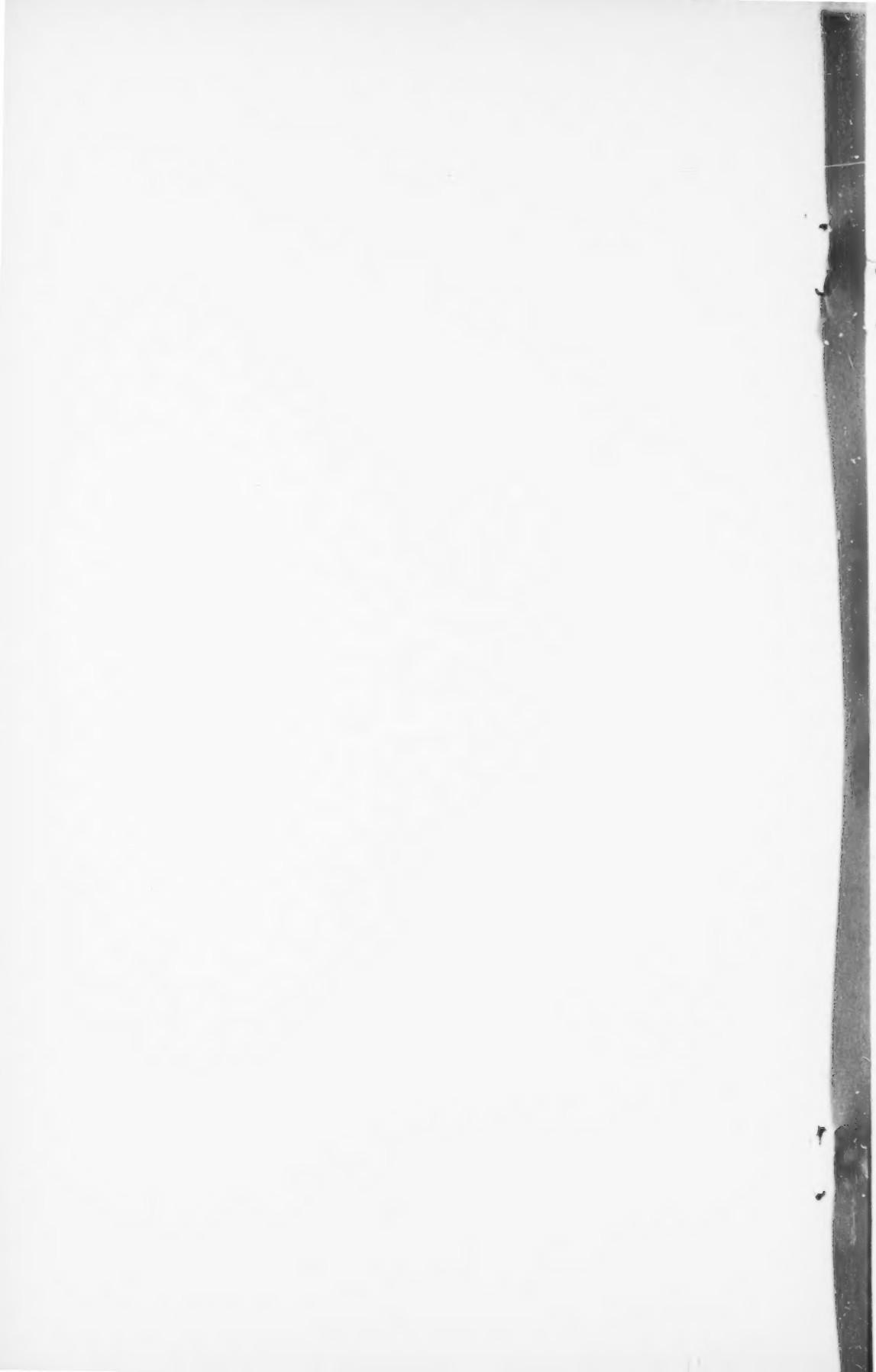
RE: DOC. HQ 75218610023

Dear Judge Reidy:

I was asked by ALJ Donald Burris to confirm with you the assistance Judge Burris provided the Senate Subcommittee on Oversight of Government Management in its investigation and review of the Social Security Disability Insurance (SSDI) Program.

The OGM Subcommittee spent over four years studying the SSDI program and benefited greatly from the information forwarded to it by persons with firsthand knowledge about various aspects of it. For example, we had one hearing exclusively on the role of the administrative law judge and the relationship between administrative law judges and the Social Security Administration. Judge Burris provided us with useful information on this and a

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number of other topics. His assistance was most appreciated.

If you would like further information from me or my staff on the contributions of Judge Burris to our Subcommittee efforts, please contact Linda Gustitus of my staff at 224-3682.

Sincerely,

Carl Levin

CL:ljg

cc: The Honorable Donald Edgar Burris
Administrative Law Judge
2251 South 56th St., West
Billings, Montana 59106

APPENDIX G

00012.4